A PRIMER OF ROMAN LAW

A LIST OF

MR. KELKE'S EPITOMES

PRICE 6s. EACH.

COMPANY LAW. 2nd Edition.

"The subject is concisely and clearly treated, and should prove a handy guide to the student."—*Law Times*

CONSTITUTIONAL LAW AND CASES.

"We think that Bar Students would derive much benefit from a perusal of its pages before dealing with the standard text-books, and as a final refresher."—*Law Students' Journal.*

DEEDS, RULES FOR THE INTERPRETATION OF.

This Epitome is intended as a primer of first principles solely for the student.

EQUITY, LEADING CASES IN. 2nd Edition.

Founded on White and Tudor's "Leading Cases in Equity."

"It is not an abridgment of the larger work, but is intended to furnish the beginner with an outline of equity law so far as it is settled or illustrated by a selection of cases. Each branch is dealt with in a separate chapter, and we have (*inter alia*) trusts, mortgages, specific performance, and equitable assignments and equitable implications treated with reference to the cases on the subject."—*Law Times.*

PERSONAL PROPERTY LAW. 3rd Edition.

"On the eve of his examination we consider a candidate for the Solicitors' Final would find this epitome most useful."—*Law Notes.*

REAL PROPERTY LAW. 4th Edition.

"The arrangement is convenient and scientific, and the text accurate. It contains just what the diligent student or ordinary practitioner should carry in his head, and must be very useful for those about to go in for a law examination."—*Law Times.*

ROMAN LAW.

"It gives a very clear and logical idea of Roman Law, and is a book to be selected by the student who desires to understand and profit by his study, as well as to pass a creditable examination. It is a book we can honestly recommend."—*Irish Law Times.*

A PRIMER
OF
ROMAN LAW

BY
W. H. HASTINGS KELKE, M.A.
OF LINCOLN'S INN, BARRISTER-AT-LAW
AUTHOR OF "AN EPITOME OF ROMAN LAW," ETC.

LONDON
SWEET AND MAXWELL, LIMITED
3, CHANCERY LANE
1912

PREFACE

THIS book is not to be taken as a new edition of the "Epitome of Roman Law," still less as an abbreviation of it. The Epitome was intended as a highly condensed summary of all the salient facts of Roman Law throughout its history, taking as its centre the era of Gaius and the Antonines, and in order to compress its whole subject-matter into 263 pages, employing numerous abbreviations. The Primer is mainly confined to the simpler system of Justinian's *Institutes*, with comparatively few references in the text to earlier history, avoiding abbreviations, and elucidating by fuller explanations and more copious illustrations. It is composed, indeed, out of mainly the same materials (so far as applicable), and in the same order as the Epitome, except that several important points of earlier Law have been relegated to the Appendix. As an elementary handbook, then, it is hoped that it may meet the wants of many who might find the Epitome too difficult or elaborate.

W. H. H. K.

LIVERPOOL,
November, 1911.

CONTENTS

CHAPTER VI

CHAPTER VII

CHAPTER VIII

A PRIMER OF ROMAN LAW

CHAPTER I

HISTORY

THE expression "Roman Law" is more particularly associated with the system as completed under Justinian and summarized in the Institutes. But properly to understand this developed system it is necessary to look at the previous growth of Law at Rome. This may be sketched under three periods.

I. **Early Times.**—The beginnings of Roman Legal History are clouded with uncertainty. But the following facts are fairly clear. The Nation was made up of three classes: *Populus*, *Clientes*, *Plebs*. (1) The *Populus* was divided into three original tribes, each tribe into *curiae*, a *curia* into *gentes*, each *gens* including many families which had their own name and sacred rites in addition to those of the *gens*. The unit of the Nation was not the Individual, but the Family. *Familia* had three meanings. (*a*) In its strict sense it stood for the Family-head (*paterfamilias*) with every person or thing under or belonging to him. (*b*) It could also be used for separate portions thereof, *e.g.* all the slaves of one owner, all property forming one inheritance, etc. And (*c*) it might mean a body

of agnates, *i.e.* a group of family-heads, all descended from a common ancestor who, if he had been living, would have been head over the whole group. *Familia* in this last sense was in fact intermediate between *gens* and *familia* in its first sense. Private Law was little more than the custom which dealt with rights and duties (i.) of family-members between one another, and (ii.) of one family towards others. There was a Great Council (*comitia curiata*), consisting of all family-heads, and a Senate of three hundred, a hundred for each tribe: this Senate represented the *gentes*, and nominated the King (confirmed by vote of the Council), and along with the King could propose new laws to be voted on by the Council. All full citizens who were family-heads, and as such formed the Council, were called *Patres;* later they were known as *patricii*, and *patres* became a name confined to senators.

(2) The true origin of *clientes* is uncertain and for Private Law unimportant. They were poor dependants of a family-head, members of his *gens*, but not of his family; they seem eventually to have merged in the plebeians.

(3) Plebeians were at first not full citizens; they had no seat in the *comitia* or other political power, and neither *jus sacrum* nor *gentes*. But by the supposed date of Servius Tullius they obtained the establishment of a second Council (*comitia centuriata*) on a property basis, representing the *plebs* as well as the *populus*. Soon a third Council (*comitia tributa*) was set up on the principle of local situation of tribes. At first it consisted only of plebeians, and a *plebiscitum* bound the *plebs* alone, while *Lex*, a law passed by

either of the older *comitiae*, bound both patricians and plebeians. Then a *Lex Hortensia* gave to a *plebiscitum* the same force as *Lex*. Finally the *comitia tributa* became the sole legislative body, and a measure passed by it was equally called a *Lex*. One of the earliest instances is a *Lex Aquilia*, passed very shortly after the *Lex Hortensia* itself. The *comitia centuriata* now met only at intervals, for the election of magistrates. As regards Private Law, we shall find the *comitia curiata* more important; it guarded sacred rites of family or *gens*, and performed some civil functions; as these became in time little more than formal, the *comitia* came to be represented merely by thirty lictors.

Hitherto new legislation had meddled little with the Rule of Family Custom. What was or was not a part of the Custom was for the College of Pontiffs to decide; they annually chose a magistrate to deal particularly with Private Law. We now come to a landmark which may be said to close the reign of pure Custom, namely, the Twelve Tables. These are known to us only by quoted fragments, which show that a process had been already going on of undermining the excessive strictness of Family or Customary Law. The object of the Tables must have been mainly by codifying to preserve as much as possible the bulk of the old existing Law, at the same time trying to pacify reformers by admitting a few innovations already current in practice.

II. **Later Republic.**—The increasing number of resident aliens and their dealings with patrician and plebeian members of the *Populus Romanus Quirites* gave rise to the idea of *Jus Gentium*, *i.e.* such law as it was

found convenient to employ when at least one of the two litigants was a non-citizen (*peregrinus*). At first this was administered only by the *Praetor peregrinus*, but the new rights and remedies admitted in his Courts soon spread to those of other praetors. The Praetor as a magistrate could legislate indirectly by Proclamation, and his edict became an important instrument for making new Law. Hitherto all the learning connected with Customary Law and Court Procedure, including particularly the Court days (*dies fasti* and *utiles*) on which the Praetor exercised his ordinary jurisdiction, had been confined to the patrician Pontiffs. Then Flavius, an Aedile, published his *Jus Flavianum*, setting out these rules for the benefit of plebeians. Next came the *Jus Aelianum*, a treatise explaining the Twelve Tables and Procedure. From this time onward plebeians took a leading part in pressing legal reform. A class of lawyers, as yet unofficial (called *jurisconsulti*, *jurisprudentes*, or shortly *prudentes*), took up the further interpretation of the Twelve Tables, later laws, and the Praetor's Edict. They had four practical functions: (1) drawing pleadings (*cavere*); (2) giving counsel's opinion (*respondere*); (3) acting for clients in suits (*agere*); and, (4) conveyancing (*scribere*). Under the second head their *responsa* did much in tracing out the course which later Law was to follow. Greek learning brought in the philosophical notion of *Jus Naturale*. This was supposed to be the primitive and perfect Law taught by Nature to mankind, from which men had sadly fallen away, and to which they should endeavour to return. Though in itself unpractical, its ultimate tendency was towards making actual Law more

systematic. The Praetor's own special Law (*jus honorarium*) consisted of *jus gentium* together with other reforms made by a succession of Praetors. This and *Jus Civile* were administered side by side in the same Court. Near the end of the Republic, Mutius Scaevola published the first complete and systematic treatise on Law. Thus the influences at work during this period were mainly three:—Plebeians, Aliens, *Prudentes;* their claims and recommendations were embodied by the Praetor in his Edict, and so became Law.

III. **The Empire.**—The old distinction between patricians and plebeians now faded away: *plebs* became the whole body of citizens who were not men of rank as Senators, ex-Senators, ex-Consuls, etc. Two new forms of legislation appeared. (1) *Senatusconsulta* were at first found convenient by the Emperor, as he could manipulate the Senate more easily than the somewhat unwieldy *comitia.* A *Senatusconsultum* was generally named after the Consul who proposed it, very often on a suggestion thrown out by the Emperor in an *oratio* delivered to the Senate. The last *Senatusconsultum* is believed to have been under Severus. (2) Imperial Constitutions were already in use, and soon became the only form of direct legislation, proceeding immediately from the Emperor. He was supposed to have this power of legislating conferred on him by the People through a *lex de imperio,* which gave him wide but defined powers: later, a *lex regia* passed at the beginning of each reign assigned to him the whole powers of the People. Constitutions were of three main kinds: (1) *Rescripta* were authoritative opinions of the Emperor, as supreme Counsel.

(2) *Decreta* were his judgments, generally on appeal, as supreme Judge. (3) *Edicta* were addressed to his subjects by him as supreme Legislator; if addressed to them through provincial or other officials, they were also called *mandata*. The *prudentes* in republican times had no authority except that gained by their reputation. Under Augustus they acquired an official position. (*a*) A certain number of them after going through a prescribed course of study (later fixed at five years) had their names placed on a Roll; these became authorized exponents (*auctores*) of Law, and were said, under the Emperor's authority, to frame laws (*condere jura*). (*b*) Under Hadrian, their opinion, if unanimous, bound Judges. (*c*) Under Theodosius II. and Valentinian, the "Law of Citations" gave preference to the "Five Jurists" (Papinian, Paul, Gaius, Ulpian, Modestinus). By this law (i) any opinion of Papinian was to bind a Judge against any one (not two) of the others; (ii) when he was silent on the point, the opinion of any three others should prevail against the fourth; (iii) if they were two and two, the Judge was nominally free to decide, but he was recommended to refer to the opinion of any earlier jurist mentioned in the writings of the Five. The *prudentes* had under Augustus split into two schools, the followers of Capito, who were later called Sabinians, and the disciples of Labeo known as Proculians. Jurists were writers of systematic treatises and commentaries; by the time of Antoninus Pius they had almost superseded ordinary *prudentes* as authorities on Law.

The Praetor's Edict, grown very long and no doubt confused by successive additions, was now edited by Salvius Julianus under Hadrian's direction. This

became the *Edictum Perpetuum* for the future. It was confirmed by a *Senatusconsultum*, which expressly retained the distinction between *Jus Civile* and *Jus Honorarium*, or as we might render the names, Law and Equity. Hadrian's reign is thus a landmark as regards the *Prudentes* and the Edict.

The Institutes of Gaius seem to have been begun under Antoninus Pius and finished under Marcus Aurelius. In this systematic treatise on Private Law he shows himself a somewhat independent Sabinian. His whole name is not known; nor is it certain whether he was a Greek of the Troad or an *auctor* at Rome. Between the dates of Gaius and Justinian the principal events to notice are the revolution in procedure made by Diocletian, the two private codifications of the Constitutions published by Gregorianus and Hermogenianus respectively, and lastly the authoritative Code of Theodosius II.

Justinian, an Eastern Emperor, also controlled Italy and the West. His legal work, under the influence of his quaestor Tribonian, falls under six heads. (1) First Code, formed of old and new Constitutions. (2) Digest or Pandects, in fifty books, founded on the Perpetual Edict and Juristic writings. (3) Institutes, in four books, a revision of those of Gaius, edited by Tribonian himself and two law professors. (4) The Fifty Decisions. (5) New Code, in twelve books, superseding the First Code and incorporating the Fifty Decisions. (6) Novels (*novellae constitutiones*); these were put forth at various dates, and 165 of them were collected after Justinian's death.

From the Twelve Tables to the completion of Justinian's reforms was about a thousand years. The

system as left by him lasted in the East till the Fall of Constantinople. In the West two legal systems, the Roman and the Germanic, flourished side by side. Modern Roman Law, under the name "Law of the Pandects," had force as *jus receptum* in Germany till the end of the nineteenth Century, and still prevails in several of our Colonies. Scotch Law and most of the Continental Codes are to a great extent founded on it.

Private Law at Rome under Justinian is our main subject. It had developed out of Family Custom, which grew into true Law as it was adopted and enforced by the Courts. Down to the last it is full of traces of its origin, showing how it was developed in the first instance by and for the benefit of a small number of Family-heads, the mass of the population being in a condition either actually servile or else quasi-servile. From this crude beginning it grew through the work of Praetor and *Prudentes*, State-encroachment, and Imperial reforms culminating in the wide generalizations suggested to Justinian by Tribonian.

CHAPTER II

LAW

As Law is a system concerned with Rights and Duties, it is well to start with a clear idea of these three terms. We may define Law as consisting of "All general rules enforced or recognized by a Court." General rules are those which command or forbid a class of acts, not merely particular acts on particular occasions. A general prohibition of the exportation of coal would be a true law: a proclamation forbidding certain particular cargoes to start would not. Right and Duty are correlative; neither can exist without the other. A legal right is where the Law aids a man in restraining for some purpose complete liberty of action on the part of another or others, and such other or others are then subject to the corresponding duty. The chief division of legal rights is into rights *in rem* and rights *in personam*. Rights *in rem* are said to prevail against all the world, or every one in general, *e.g.* the right of A to keep B, C, D, etc., off his field or from meddling with his horse. Rights *in personam* are against some definite person or persons; they grow out of some special relation between him who has the right and the other or others who are subject to the duty, *e.g.* A's right to

demand from B repayment of the loan he lent to B. The Romans had not these precise names for rights. But all rights *in rem* are of the nature of property-rights, and for property or ownership they used the word *dominium*, which was protected by an *actio in rem* for getting back the particular thing itself (*res*). Similarly any special relation between definite persons involving right and duty was *obligatio*, which gave rise to an *actio in personam* for compelling the defendant to pay money to the plaintiff. Thus the Romans used this phraseology only of actions: medieval commentators transferred it to the rights guarded by the actions. We said above "property or ownership." The word "property" is ambiguous: sometimes it means ownership; sometimes the thing owned: we shall therefore, as a rule, use "ownership" for the first, and "property" for the second meaning only.

The Institutes make a threefold division into *Jus Personarum*, *Jus Rerum*, and *Jus Actionum*. The first may be adequately rendered by "Family Law." It stood first because, the unit of the Roman State being the Family, the relative position of its constituent members seemed to the Romans to be the main foundation of their legal system. The second division, Law of Things, comprised Property Law (including Inheritance Law), and also the Law of Obligations, forming, in fact, the bulk of what we term substantive law. The third, Law of Actions, we should say was adjective law, subordinate to the other two. For the Romans, however, it held a high and co-ordinate place, because so large a part of their rights, being praetorian rights, grew out of the new remedies which the Praetor introduced. We look on

the right as anterior to the remedy; they rather regarded the right as the offspring of the remedy. The word *Jus* had three meanings. It was (1) objectively the whole body of Law; (2) subjectively any single right vested in a person, especially right of action; (3) in more popular language, the Praetor's Court, because he was mainly judge of law; this contrasts it with the Judge's Court, his chief duty being to sift facts. The first and second meanings still belong to French *Droit*, and to German *Recht*, and indeed run through all Continental jurisprudence.

The Institutes were published as an authoritative summary with the force of Law, besides being an elementary manual for students of Private Law. In England little stress is laid on the distinction between Public and Private Law. The Romans sharply discriminated between them, as Continental jurists still do. Public Law for the Romans included what we call Constitutional and Criminal Law; also Religious Law (*jus sacrum*) which bore strongly on Private Law, because in the pagan times each *gens* and *familia* had had its own sacred rites. Private Law was confined originally to the mutual rights and duties of Family-members as such to one another and to other families; it was only in later times that they could be regarded simply as individuals. A practical distinction was that no duty once established as falling under Public Law could be waived, while many resting only on Private Law could be. We have said that State-encroachment on the Ancient Custom played a great part in legal reform; this is only another way of saying that Public Law increasingly affected Private Law.

All Law, Public or Private, is said by Justinian to

rest on three primary maxims, namely to live honourably, not to hurt others, and to render to every man his due: all three are in truth rather ethical than legal. Again, he follows Ulpian in deriving all Private Law from three sources, (1) Law of Nature, (2) Law of Nations, (3) Civil Law. In practice the first and second were identical, the first being only a philosophic and theoretical way of looking at the second. However, Justinian suggests one distinction by remarking that slavery, admitted by the Law of Nations, was repugnant to the Law of Nature. In reality this only means that when the Praetor first began his reforms, no one, whether Roman or foreigner, doubted the propriety of slavery. Later, the progress of civilized ideas taught people that it was an undesirable institution in itself, though perhaps too firmly established to be immediately abolished. But it was the fashion to regard all reforms as so many steps backward towards the perfect Law of a primitive "Golden Age." Gaius, more logical here than Tribonian, omits Law of Nature altogether. As for Civil Law, it was really the oldest, being the Custom or Common Law of Rome as gathered from the Twelve Tables and commentaries on them, together with the older statutes.

Private Law was either *jus scriptum* or *non scriptum*. The first was far more extensive and important; it became Law proper by six modes of legislation:—*Lex*, *Plebiscitum*, *Senatusconsultum*, Imperial Constitutions, Praetor's Edict, *Responsa Prudentium*. We have seen that the first four were all direct modes, and followed each other in chronological order. The last two were indirect, and existed contemporaneously with the others. The Edict was indirect, for the

Praetor did not profess to make new law; his Edict generally said *Dabo actionem* under certain circumstances, and out of this action was evolved a new right. The *Responsa* were indirect, for it took time to see what was the legal rule to be extracted from the often conflicting opinions of the *prudentes*. As the Edict received but few and trifling additions after Hadrian, and the *Responsa*, as a form of legislation, ended with Modestinus under Severus, the Constitutions alone remained as a method of fresh legislation. Of laws made in the old ways, some were repealed, some had fallen into disuse, but a great number remained in force and are appealed to as authority for statements in the Institutes.

The *Jus honorarium* by the time of Justinian was virtually the *Edictum Perpetuum*, together with a few edicts of the Curule Aediles, mostly on mercantile law and matters affecting the public roads. This Praetorian Law, more flexible and capable of adaptation to changed circumstances, has been called "Roman Equity." The jurists generally contrasted it with the Civil Law by using the words *bona fides* as against *jus strictum*. Sir Henry Maine connects the word *Aequitas* with *aequatio*, *i.e.* the levelling of inequalities in Civil Law which pressed hardly on various classes, especially aliens. But this was perhaps intended more for the benefit of citizens than of the aliens themselves. Romans wanted to deal with resident foreigners for their mutual advantage, and these foreigners hung back as long as the Civil Law excluded them from obtaining legal recognition of their moral rights. There is one great distinction between English and Roman Equity. English Equity was formerly all but

confined to the Court of Chancery; it is even now more particularly the Law of the Chancery Division. Roman Equity was all along administered side by side with Civil Law by the same Praetor in the same Court. "If your case, as based on Civil Law, is a bit weak," says Quintilian, "try to throw in a little Equity; the magistrate is always glad to listen to it." Again, Roman Equity was largely introduced by so-called "fictitious" actions. But there was no fiction in the modern sense. If Aristo the Greek sought the aid of the Praetor, it was not pretended that he was a citizen, but the Judge was directed to decide the case "as if he were a citizen."

Up to the time of Hadrian the Edict was annually growing. Each Praetor took over the bulk of his predecessor's Edict: this was called *edictum tralatitium*. Then he made additions, on the advice of one or more *prudentes*. The whole was now his *edictum perpetuum*, *i.e.* continuous through his year of office. He could make further additions, as occasion presented itself, but he could not detract from it: this was forbidden by *Lex Cornelia de edictis*. Under extraordinary circumstances he could also make a particular *edictum repentinum*, not meant to be a permanent addition.

Jus commune was a name given to the ordinary Law as it affected average persons. *Jus singulare* was exceptional, in favour of privileged classes, especially soldiers, minors, and women. *Jus non scriptum* was Custom, *i.e.* what was generally recognized as such, and understood to have come down from ancient times, though not found in any authorized writing. It was said to be "likened to Law," because

General Customs bound a Judge, although the Praetor could override them.

Each book of the Institutes falls into two main parts. After a little preliminary matter, the first part of Book I. treats of the ordinary Family-head and the other family-members; the second part deals with the *paterfamilias* who is under the disabilities of minority or lunacy. The first part of Book II. is concerned with rights of ownership, again mainly those of a Family-head: the second with devolution of family-headship and property by will. The first part of Book III. treats of devolution on intestacy: the second treats of rights *in personam*, principally by Contract. Book IV. in its first part is given to such rights *in personam* as arise out of wrongdoing or Delict and the like; its second part is taken up with Procedure. It will help us to grasp the subject as a whole, if we notice how both praetorian and imperial reform gradually and in detail tended to obscure the ancient idea of the Family, and this partly by bringing forward the Individual in relation to the State, partly by substituting blood-relationship (*cognatio*) for the older Civil relationship (*agnatio*).

CHAPTER III

THE FAMILY

I. Slaves

The Roman idea of Family, though very ancient, was highly artificial, and so remained even under Justinian. At his date the Family comprised three classes, (1) the *paterfamilias* himself, (2) slaves, and perhaps (3) children. The wife and mother was not a family-member of her husband's household: if there were children, they might or might not (in strict law) belong to this family. As a preliminary to elucidating these points it is essential to understand three very technical terms, *Persona*, *Status*, *Caput*. Each is sometimes loosely used by the jurists, but in their strictest meaning, (1) *Persona* was a natural or artificial person, considered as capable of filling a legal character by being invested with rights, subject to duties, or generally both. *Persona* then is not the same as *Homo*; it is usually a particular aspect of a *homo*, and is sometimes not a human being at all. (2) *Status* was the particular degree of this capacity; the standing, as it were, of a person on a higher or lower step. (3) *Caput* included three leading or capital capacities or any one of them, the three being Freedom, Citizenship, Family. A Roman must be

either free or slave; citizen or non-citizen; family head or subordinate family-member. The whole *Jus Personarum* may be called "Law of Status," in Private Law with reference to position in the Family; in Public Law to position as regards the State. In modern times status is generally used of conditions of disability, as infancy, lunacy, bankruptcy, etc. None of these in Roman Private Law formed a status.

On the lowest rung then of the Family ladder stood the slave in the *dominica potestas* of his master. Though he was in the master's *familia* it was agreed that he had not *caput*. On the other hand, legal usage seems to settle that he had *status*. There has been a dispute whether Roman Law regarded the slave as a person, or only as a chattel (*res*). The true answer appears to be that he was both. Not only was he treated as a responsible being subject to duties, but from the beginning of the Empire, or a little earlier, he had distinct legal rights, none the less legal because he could not himself bring an action to enforce them. At the same time he was also a *res*, as being capable of being owned and conveyed from owner to owner.

One division of persons was into those *sui juris* (family-heads) and those *alieni juris*. The first must be free; the second might be freemen or slaves. Freedom was defined as the Capacity for doing as a man wished, unless prevented legally (*de jure*) or illegally (*de facto*). If a man was *de jure* free but *de facto* slave, his status was that of slavery, unless and until his freedom was established at law. A slave was called *mancipium*, *i.e.* taken by the strong hand, or *servus*, *i.e.* preserved, because the typical slave was a prisoner of war whose captor had spared his life. But very often a slave was

CHAPTER III

THE FAMILY

I. Slaves

The Roman idea of Family, though very ancient, was highly artificial, and so remained even under Justinian. At his date the Family comprised three classes, (1) the *paterfamilias* himself, (2) slaves, and perhaps (3) children. The wife and mother was not a family-member of her husband's household: if there were children, they might or might not (in strict law) belong to this family. As a preliminary to elucidating these points it is essential to understand three very technical terms, *Persona*, *Status*, *Caput*. Each is sometimes loosely used by the jurists, but in their strictest meaning, (1) *Persona* was a natural or artificial person, considered as capable of filling a legal character by being invested with rights, subject to duties, or generally both. *Persona* then is not the same as *Homo*; it is usually a particular aspect of a *homo*, and is sometimes not a human being at all. (2) *Status* was the particular degree of this capacity; the standing, as it were, of a person on a higher or lower step. (3) *Caput* included three leading or capital capacities or any one of them, the three being Freedom, Citizenship, Family. A Roman must be

either free or slave; citizen or non-citizen; family head or subordinate family-member. The whole *Jus Personarum* may be called "Law of Status," in Private Law with reference to position in the Family; in Public Law to position as regards the State. In modern times status is generally used of conditions of disability, as infancy, lunacy, bankruptcy, etc. None of these in Roman Private Law formed a status.

On the lowest rung then of the Family ladder stood the slave in the *dominica potestas* of his master. Though he was in the master's *familia* it was agreed that he had not *caput*. On the other hand, legal usage seems to settle that he had *status*. There has been a dispute whether Roman Law regarded the slave as a person, or only as a chattel (*res*). The true answer appears to be that he was both. Not only was he treated as a responsible being subject to duties, but from the beginning of the Empire, or a little earlier, he had distinct legal rights, none the less legal because he could not himself bring an action to enforce them. At the same time he was also a *res*, as being capable of being owned and conveyed from owner to owner.

One division of persons was into those *sui juris* (family-heads) and those *alieni juris*. The first must be free; the second might be freemen or slaves. Freedom was defined as the Capacity for doing as a man wished, unless prevented legally (*de jure*) or illegally (*de facto*). If a man was *de jure* free but *de facto* slave, his status was that of slavery, unless and until his freedom was established at law. A slave was called *mancipium*, *i.e.* taken by the strong hand, or *servus*, *i.e.* preserved, because the typical slave was a prisoner of war whose captor had spared his life. But very often a slave was

verna, i.e. born of a slave mother. A foreign freeman, or a Roman in civil wars, might, as above, become a slave under the Law of Nations. Also, under Civil Law, a Roman freeman might in three ways be reduced to slavery. (1) A freedman might be for certain acts of ingratitude to the master who had manumitted him. (2) Under *Senatusconsultum Claudianum* for the following fraud. A and B, two freedmen, conspire. A pretending to be B's master sells him to C, and A and B then divide between them the purchase money, B of course intending presently to assert his freedom. On proof of the facts B would by this law become the real slave of C. (3) Under Public Law certain criminals became *servi poenae*, condemned to work in mines or fight in the amphitheatre. At the date of Justinian there were, besides slaves proper, many serfs (*coloni ascripti glebae*): their status was nominally that of freedom, but they were bound to the land, passing with it from owner to owner and paying a ground-rent.

Freemen might be either freeborn (*ingenui*) or freedmen (*libertini*). Generally, any one whose mother had been free at any time from her child's conception to its birth was freeborn. And all *ingenui* born within the Empire after a law of Caracalla to this effect were citizens. At the date of Justinian, non-citizen freemen would be almost entirely Persians and some other Orientals. Citizenship was essential for full legal capacity. As regards Private Law, it gave (1) the right of using Civil Law contracts, conveyances, and actions (*jus commercii*), but this distinction was more theoretical than practical at this date; (2) capacity for legal marriage (*jus connubii*). A third

right, that of voting (*jus suffragii*), belonged wholly to Public Law.

Freedmen were so by manumission, formal or informal. Formal manumission was of three kinds. Originally these had been *censu, vindictâ, testamento:* they were now (1) *Vindictâ,* (2) *Testamento,* and (3) *In Ecclesiâ.* The first old method was lost by cessation of the census under Decius, leaving only two. Then Constantine introduced the third new form. (1) *Vindicta* was a fictitious suit or *causa liberalis,* in which a lictor or some other acting as *assertor libertatis* before the Praetor, in or out of Court, touched the slave's head with a wand (*vindicta*) as equivalent to the *hasta* or Spear of Power, and claimed him in the name of liberty as against his master. The master then assented by turning him round, and sometimes further by putting on his head the cap of liberty. Thereupon the Praetor pronounced him free. (2) *Testamento* included four varieties. (*a*) The simplest was direct legacy of liberty to the slave: he was then called *Orcinus,* his late master (now patron) being in Hades (*Orcus*). (*b*) Conditional legacy, *e.g.* to be free as soon as he had brought in and settled his accounts: in the interval, though he was called *statuliber,* he was really slave of the heir. (*c*) Implied gift, *e.g.* instituting him heir, or appointing him tutor to the testator's child. (*d*) Trust-legacy (*fideicommissum*); the heir or other person named must then manumit him, and become his patron. (3) *In Ecclesiâ* must be in the diocesan church, and before the Bishop. Observe that Censor, Praetor, and Bishop were all State officials, and wills too were originally made by way of a law passed in the *comitia curiata.* Manumission

was thus in theory an Act of State for the admission of a fresh citizen.

Informal manumission, on the other hand, was by any purely private act of the master showing his intention, *e.g.* a declaration made over the supper-table, or otherwise *inter amicos*, letter, codicils, etc. None of these, before Justinian, made the manumitted slave a citizen. Indeed, at the beginning of his reign no slave could by manumission receive the *caput* of citizenship unless two conditions were fulfilled. (1) The manumission must be formal. (2) The manumitter must have full ownership (*dominium ex jure Quiritium*), and also right of actual possession, the so-called "Bonitarian" ownership.[1] But after Justinian's earlier reforms informal manumission became in general as good as formal. Still there remained some restrictions imposed by two famous laws. Under *Lex Aelia Sentia*, (1) the master must be over twenty, the slave over thirty, unless the manumission was by *vindicta*, and also on a ground approved by a Board (*consilium*), *e.g.* that the slave was foster brother, intended wife, or intended attorney (*procurator*); (2) manumission must not be in fraud of creditors, *i.e.* with intention to cheat them and the actual effect of so doing; (3) slaves of infamous character became on manumission *dedititii*, such as were some conquered and disgraced enemies. Under *Lex Junia Norbana* any informality made the freed slave a Latin (*Latinus Junianus*); he had *jus commercii*, not necessarily *jus connubii*, and never *jus suffragii*. He might, however, afterwards in various ways acquire citizenship. Justinian in effect repealed this *Lex Junia*, and the third

[1] See p. 49.

provision of the *Lex Aelia Sentia*, and made three other great enactments. (*a*) He made all freed men to be citizens. (*b*) He confirmed the opinion, hitherto not certain, that the institution of a slave as *heres necessarius* impliedly freed him. (*c*) He lowered the age of capacity for manumitting first to eighteen, and later (in the Novels) to fourteen, the age of testamentary capacity. (*d*) He repealed *Lex Fufia Caninia*, under which manumission by will had been restricted to fixed numbers of slaves, ranging from one to a hundred, according to the whole number owned by the testator. All this tended to great increase in the number of citizens.

The relation between freedmen and patron was not merely nominal. (1) Acts of reverence (*obsequium*) were due to the patron, *e.g.* the freedman must support him, if he fell into poverty, and without express leave from the Praetor could not sue him. (2) Actual services, whether expressly settled or not, were due from the freedman. (3) The patron had certain rights of succession, the freedman's power of willing being limited. But a freedman might, in exceptional cases, rise to the status of the freeborn, (*a*) by imperial grant of *jus aureorum annulorum*, which reserved all the patron's rights, or (*b*) by so-called *natalitium restitutio*, which was made with the patron's consent and extinguished his rights.

The slave by this date had obtained certain personal rights. Under the Republic and early Empire the master had still retained, in legal theory, his primitive right of killing his slave as readily as he would kill any other live chattel: the only check on its exercise was public opinion. There were five

definite steps by way of ameliorating legislation. Killing another man's slave was already an actionable wrong (*delictum*). But (1) *Lex Cornelia de sicariis* made it criminal homicide: this was some recognition of the slave as a person. (2) *Lex Petronia* forbade the master to expose his slave to beasts in the amphitheatre, reserving this as a judicial sentence for crime. (3) Hadrian abolished the master's right of killing without magisterial sanction. (4) Antoninus Pius made two changes: (*a*) killing by the master became homicide; (*b*) an ill-treated slave had power given him to flee for sanctuary to a temple or to the Emperor's statue. The case must then be investigated by a magistrate; if the slave's allegation was proved, an Order was to be made for selling him to a new master. (5) Lastly, Constantine forbade excessive punishment by a master, a prohibition expressly confirmed by Justinian. The slave himself could not enforce any of these rights by ordinary action, though in case (*b*) above we see that he could set in motion the *extraordinaria cognitio* of the magistracy. As to rights of property, the slave had none for his own benefit. Usage and his master's kindness or convenience generally ensured him a *peculium*, but he had no legal right to obtain or keep it. But three true legal rights for the benefit of others became firmly established. (1) If the master expressly or tacitly allowed a slave to deal with free persons on the faith of his *peculium*, any creditor's claim took precedence of the master's right.[1] (2) Legal consequences resulted from "Natural Obligations" entered into between master and slave; these became operative if

[1] See p. 112.

the slave was afterwards manumitted and in some other cases. (3) Under Public Law, as Ulpian tells us, any slave of the Roman People could bequeath half his *peculium* by will. This last is a very strong recognition of the slave as a person.

II. Wife and Children.

The married woman scarcely figures in Roman Law except as one possible origin of *patria potestas* over children. *Patria potestas* had anciently differed little, if at all, from *dominica potestas*. Little of it was left by the time of Justinian except (1) the right of the family-head to control the marriage of sons and other issue, and (2) his power over their *peculium*. *Patria potestas* arose in four ways, (1) by birth of children in legal marriage, (2) by legitimation, (3) by adoption, and (4) by express grant to a naturalized alien.

(1) Marriage was constituted by an agreement, which resembled "Consensual" contract; though the Romans did not in speaking of it use the noun *contractus*, they did use the verb *contrahere*. The only form essential was some open manifestation of intention on both sides: this was generally by *deductio in domum*, *i.e.* the husband or a friend on his behalf took the bride before witnesses to the husband's house. This was enough for genuine and, so to speak, respectable marriage. But there was no technically legal marriage (*justae nuptiae*) unless four, or even five, conditions were fulfilled. These were (*a*) age, (*b*) consent, (*c*) *connubium*, (*d*) the not being within prohibited degrees or classes, and (*e*) consent of *paterfamilias* (if

any). Under (*a*) the age began at fourteen for the husband, twelve for the wife. (*b*) Consent must be evidenced, as above. (*c*) *Connubium* or *jus connubii* meant that both must be citizens; this excluded slaves and aliens, and had formerly excluded many (not all) as Latins. (*d*) Prohibited degrees. Constantine had forbidden marriage with a niece or with a deceased wife's sister; Arcadius and Honorius had forbidden marriage of first cousins, Justinian forbade marriage with the daughter of one's divorced wife or with the betrothed of one's son. Marriage was forbidden between ascendants and descendants by adoption, even after the adoptive tie was dissolved. As between collaterals by adoption, any prohibition was removed by its dissolution, *e.g.* A could not marry his uncle's adopted daughter unless and until his uncle emancipated her. Prohibited classes: marriage was forbidden between Jew and Christian; between patrician (in the wide sense) and freedwoman; and between the governor of a province, while he remained governor, and a native of his province. Condition (*e*) included not only the existing family-head, but any possible future one, *e.g.* A, B, C are father, son, grandson, B and C being in A's *potestas;* both of them would require A's consent to marry, but C would also require B's consent, as B on A's future death would have *potestas* over C. But consent might be presumed from (i) silence after knowledge that a *filiusfamilias* intended to marry, or (ii) three years' absence from the province. If the family-head was insane, approval by a magistrate must be obtained. *Materfamilias* was strictly any woman *sui juris*, married or not; it was, however, often extended to a wife by *justae*

nuptiae, even though she was really under her father's *potestas*. Marriage between a citizen and an alien was *injustae nuptiae;* it was valid *jure gentium*, not *jure civili;* it made the wife *matrona;* it sufficed to support a legal settlement of the marriage-provision called *dos*, but did not give the husband *potestas* over his children; the children, however, would be citizens, wherever born, if their father was the citizen. If their mother was the citizen, and they were born within the Empire, they would (after Caracalla's law) be citizens; if born outside the Empire, they would be aliens.

Concubinatus was the union, permanent at least in intention, between two persons who had no living wife or husband, and who were not within the prohibited degree of consanguinity or affinity. They might be, and often were, members of classes between whom legal marriage was forbidden by State policy, *e.g.* governor and native. It neither gave *potestas*, nor supported *dos*. Thus it differed completely from the Oriental concubinage of inferior members of a harem, resembling rather the "morganatic marriage" of Continental royalties. Roman Law then recognized three sexual relations in descending degrees of respectability between free persons, *justae nuptiae*, *injustae nuptiae*, *concubinatus*. The union of slaves was *contubernium* with two legal effects, (1) it was governed by the same rules as to prohibited degrees, (2) it created blood-ties among the issue.

Promise of marriage or betrothal (*sponsalia*) had been made among the ancient Latins by formal contract of *stipulatio*, so that it was binding and actionable on both sides. The later Romans arrived

at a very similar result more indirectly; their ceremony of *sponsalia* included a deposit or the giving of security for agreed damages to be forfeited in case of breach of promise.

Marriage was accompanied by a money settlement, regularly made on the wife's side under the name of *dos*, and generally in the later Empire on the husband's side also (*donatio propter nuptias*). *Dos* was a provision for the expenses of married life: it was *dos profectitia* when found by the wife's father or other male ascendant, and the wife had a right to call for it, unless the father expressed disapproval of the marriage. If provided by the wife, or any other than a male ascendant, it was *dos adventitia*. Either kind might be paid down (*data*), or covenanted for (*promissa*) by stipulation or otherwise. The husband had little real power over it, though he was nominally the legal owner. If the marriage terminated by the husband's death, or by divorce, the *dos* less deductions for any costs actually incurred went back to the wife, unless it was *dos receptitia*, *i.e.* given under express agreement for return to the giver. Thus *dos* in no way resembled our dower or dowry. *Donatio propter nuptias* was a corresponding settlement provided on the husband's side, over which the wife's rights would usually resemble those of the husband over the *dos*. Any property of the wife which she retained as her own (English "separate estate") was called *parapherna*. Thus an *instrumentum dotis* could be drawn up in such terms as to provide for *dos*, *donatio*, and *parapherna*: this would somewhat resemble the first trusts of an English marriage settlement, but would differ by not going on to provide for rights of any

children of the marriage. The subject of *manus*, once connected with marriage but obsolete before Justinian's time, will be noticed in the Appendix.

Divorce was a mere private act without any proceeding in Court, and was at the beginning of Justinian's reign extremely common. It was *divortium* when made by mutual consent, *repudium* when either party sent to the other a letter of divorce (*libellus repudii*). Justinian eventually punished groundless divorce by forfeiture of property and shutting up the offender for life in a monastery or convent.

(2) Legitimation was confined to the children of a *concubina:* it began in the later Empire, and occurred in three ways. (*a*) The earliest was under Constantine's enactment legitimating *per subsequens matrimonium*, but on two conditions, (i) an instrument in writing drawn up to attest the marriage, or preferably to settle also the *dos;* (ii) ratification by the child or children; they were then legitimated for all purposes. (*b*) By one of the Novels, if marriage was rendered impossible by the death or disappearance of the *concubina*, an imperial rescript could be applied for, having the same effect. (*c*) At an intermediate date, the method called *oblatio curiae* had been invented by Theodosius. This was the placing of the child's name on the Roll of persons liable to serve as provincial magistrates (*decuriones*). It was an expensive duty, and the supply of volunteers was running short, so parents who wished to gain *potestas* over their natural children were thus bribed to supply the demand. Such legitimation gave (i) *potestas*, (ii) mutual rights of succession between father and child,

but (iii) no right of succession to uncles, cousins, or other agnates.

(3) Adoption was a much older, wider, and more important system. It included (*a*) Arrogation; (*b*) Adoption proper, which might under Justinian be (i) *plena* or (ii) *minus plena*. (*a*) Arrogation was adoption of a person *sui juris*, and it brought the children of the person arrogated as well as himself under the *potestas* of the arrogator. It was not a private act, but by Imperial Rescript, as it was a matter of State concern to see that the number of families was not unduly diminished. In earlier times it had been necessary to ask the *comitia curiata* to pass a law on each such occasion. Antoninus Pius was the first to allow arrogation of a *pupillus* (one under fourteen), but only on four conditions, (i) good ground shown on inquiry, (ii) security given to a notary that, if the pupil died under fourteen, all his property should be handed over to his representatives, (iii) security that he should not be emancipated except on good grounds, and should then have back his property, (iv) the "Antonine Fourth," *i.e.* that if the arrogator should unreasonably emancipate or disinherit the arrogatee, he must further give to him one-fourth of his (the arrogator's) own property. And the rescript was generally refused, if the applicant had already a child or reasonable probability of one.

(*b*) Adoption proper was of one *alieni juris*; it was, under Justinian, carried out by a deed executed before a magistrate after a declaration of consent made by both the actual father and his son. It was (i) *plena*, *i.e.* giving *potestas* and mutual rights of succession, if the adoptive father was an ascendant, *e.g.* the maternal

grandfather (a very common case). It was (ii) *minus plena, i.e.* giving no *potestas*, but merely rights of succession on intestacy, if the adoptive father was not an ascendant. An arrogator or adoptor must be at least eighteen years older than the arrogatee or adoptee. Women could of course have no *potestas* over their children, but by special rescript a woman who had lost children might so far adopt as to create mutual rights of succession between herself and an adoptee. If a master professed to adopt his slave, this under Justinian conferred the *caput* of liberty but not of family; such a freedman had therefore no right of succession to his patron or his patron's agnates. Adoption proper, under the old Law, had been carried out by an intricate process: three fictitious sales of a son (one for any other issue) destroyed the father's *potestas*, and a fictitious suit (*in jure cessio*) followed to establish the *potestas* of the adoptive father. Thus, until Justinian's reform of the system, a family-head could have transferred his own child to the *potestas* of another, or brought any stranger into his own *potestas*, and this in both cases even against the wish of the adoptee.

(4) If an alien and his children were naturalized, the latter became citizens *sui juris*, unless, after inquiry had shown which course was more beneficial for them, the Emperor expressly declared them to be subject to their father's *potestas*.

If an adult *filiusfamilias* resisted the *potestas*, the father could not sue him by ordinary action, but could appeal to the *extraordinaria cognitio* of the Praetor, who thus had a discretion to interfere or not. But if a third person abetted the son's rebellion, the

father could sue this person by *vindicatio in potestatem*; this was a "real" action framed exactly as if the son were an ordinary chattel of his father. Or he could proceed by the interdict *de liberis exhibendis*, a proceeding somewhat like our injunctions. So, too, if the wife's relations or any other illegally detained her, the husband had an interdict *de liberâ exhibendâ*. An adulterer was criminally liable under a *Lex Julia*.

Patria potestas was terminated in four ways: (1) death of the family-head; (2) *capitis deminutio* of either *pater* or *filiusfamilias*; (3) certain dignities; (4) emancipation. (1) If A had a son B in his *potestas*, on A's death B became *sui juris*. But if A, B, C, were father, son, and grandson, and nothing in the way of emancipation had occurred, then both B and C would be in the *potestas* of A, and on A's death C would fall into the *potestas* of B, the new family-head. If, on the other hand, B died first, C would remain in A's *potestas*. (2) *Capitis deminutio* was of three kinds, *maxima*, *media*, *minima*. (*a*) *Maxima* was loss of liberty by the family-head or by the child. If the loss was temporary, *e.g.* if either of them was captured by the enemy, the *potestas* was only suspended; if the captive escaped or was ransomed, it revived by "postliminy," *i.e.* recrossing the border into the Empire. (*b*) *Media* consisted in loss of citizenship. This happened by *deportatio in insulam*, *i.e.* confinement in an island or other restricted area: this punishment had superseded the old *interdictio igni et aquae*, *i.e.* an official boycotting which cut off the means of life, and so drove the offender out of Italy. Before Caracalla's enactment *media* had also occurred when a Roman joined a Latin colony.

(c) *Minima* was by loss of place in his original family; this, says Justinian, occurred by arrogation or emancipation, apparently excluding adoption proper. The old view seem to have been that *deminutio* involved a real lessening of status, but the Institutes explain it as "change of former status." A note on this question will be found in the Appendix.

(3) At the date of the Institutes, only one dignity, the Patriciate, *ipso facto* relieved a *filiusfamilias* from *potestas*. A Patrician in this its latest meaning was a titular co-Emperor or assistant ruler, generally over some definite and large area. Naturally there were very few so honoured. So in pagan times only the High-priest of Jupiter (*Flamen Dialis*) and the Vestal Virgins had by mere dignity of their office been freed from *potestas*. But later (by a Novel) every one who reached high rank in the ecclesiastical, military, or civil service, thereby became *sui juris*—a great blow to the ancient idea of Family-headship. Up to the date of this Novel an Archbishop, the Commander-in-chief, or the Prefect of Rome, might as regards Private Law be subject to the *potestas* of some very obscure citizen.

(4) Emancipation was ordinarily effected by a declaration made by the father and son together before a magistrate. If they were too far apart to appear together, then on application it could be made in the Emperor's name under the "Anastatian Rescript." Until the issue of the First Code the ordinary method had been, under the Twelve Tables, for the father to sell his son three times (daughter or grandchild, once) by fictitious sale (*mancipatio*) to a nominal purchaser; this was followed by manumission (not, as

in adoption, by *In jure cessio*). Thus till quite late times was a child, whatever his age and public position, treated as the legal chattel of the family-head. Once emancipated, he became in Civil Law a non-agnate and complete stranger to his father and father's relations, though we shall hereafter find that the Praetor gave him certain rights as a cognate. The Roman *familia* was thus both wider and narrower than the English family. It was wider, as including adopted children; narrower, as excluding children emancipated or otherwise released from *potestas*. And outside the Family-circle in its stricter sense the same may be said of agnates or Civil Law relations; brothers, uncles, cousins of a *paterfamilias* on the paternal side were *primâ facie* his agnates, though they might be so only by adoption, and if by birth, might at any moment by emancipation cease to be his agnates. The status of Bondage (*mancipium*), obsolete before Justinian, is briefly noticed in the Appendix.

III. Tutors and Curators.

A *filiusfamilias* might become *sui juris* while he was still a minor, and he did not attain his full majority till he was twenty-five. A minor who was a boy under fourteen, or a girl under twelve, was an infant; above that age, an adolescent. An infant *sui juris* was bound to have a tutor, generally appointed by the will of his deceased family-head. This testamentary appointment has sometimes been described as "an artificial prolongation of *patria potestas*." But this is not in accordance with Roman ideas. For tutorship differed materially from *potestas*. (1) The

tutor as such had no pecuniary interest in his pupil's property, as the family-head had in a son's *peculium*. (2) The relation between tutor and pupil was *in personam*, while that between *pater* and *filiusfamilias* was, we have seen, *in rem*. Tutelage lasted through infancy only; afterwards the adolescent was practically sure to have a curator.

Tutors were divided into four classes, according to the mode of their appointment; they were either (1) Testamentary, (2) Legal, (3) Fiduciary, or (4) Dative. (1) The Twelve Tables had given or confirmed the right of appointing by will; under Justinian it was also allowable to appoint by codicils. The infant might be one born before or after the will, or be posthumous, *in potestate* or emancipated, legitimate or natural (child of a *concubina*), or even a stranger to whom the testator had placed himself *in loco parentis* by leaving him property. But unless the infant was *in potestate*, the appointment required confirmation by a magistrate, a mere form in case of an emancipated child, but allowed only after inquiry in case of a natural child or stranger. (2) Legal tutors rested on the old Civil Law: there were three divisions of them, (*a*) the nearest Agnates (later the Novels substituted Cognates), all of the same degree being joint tutors; (*b*) the Patron or (if he was dead) his children to a young enfranchised slave; (*c*) Parents to infant children when emancipated. But, though the Twelve Tables expressly added the patron's children after himself under (*b*), they did not add elder children after parents. The two cases were analogous, but not identical. So if A died intestate leaving a grown-up unemancipated son B, and an emancipated son C under fourteen, B became tutor

to his brother C under the name of (3) Fiduciary tutor. (4) Dative tutors were those appointed by a magistrate. Some old and unsatisfactory laws on this subject having fallen into disuse, at Rome the *Praefectus Urbi* appointed to pupils of rank or riches, and the Praetor to others. In the provinces the Governor (*praeses*) appointed to pupils having 500 *solidi* or more; below that figure the appointment rested with minor magistrates (*defensores*).

In three cases security was given by a tutor. (*a*) By agnates, (*b*) on appointment by *defensores* (in both cases compulsorily). (*c*) A co-tutor might optionally offer it, if he wished to be sole acting tutor (*onerarius*), leaving his colleagues to be dormant tutors (*honorarii*). In practice a tutor was probably nearly always either testamentary or dative.

A Roman tutor had of course no resemblance to an English teaching tutor, and not much to a guardian, as he could not compel his pupil to live with him or where else he might choose, nor could he fix the amount of his maintenance. His office was twofold, (1) like some English trustees, to manage the property, and (2) to interpose his *auctoritas*. This was the technical term for his power of supplementing the pupil's legal incapacity, so as to make an act valid which without it would be wholly or partly void. An infant had in law no understanding (*intellectus*) before the age of seven, and no judgment (*judicium*) until he was fourteen: either deficiency was supplied by the *auctoritas*. But there was a distinction. In supplying the *intellectus* the tutor must be able to prove necessity for the act: for the *judicium* it was enough to show that he had acted with reasonable discretion. If an

infant contracted with an adult, *e.g.* by ordering goods on credit, this generally bound the adult, but not the infant. If an infant, even though he were nearly fourteen (*pubertati proximus*), professed of himself to take up an inheritance left to him, his acceptance of it was utterly void for lack of the *auctoritas*. The tutor must interpose personally and at the time, not by giving written leave or by subsequent ratification. A debtor who wished to pay his debt to a pupil should get an Order of Court free of cost to protect him; otherwise if he paid the money to the pupil, who lost it, or paid it to the tutor, who embezzled it, he was liable to pay again.

There were seven special safeguards against misconduct of a tutor: (1) security by deposit or guarantee (see above); (2) tacit hypothec on the tutor's property; (3) inventory to be taken of the pupil's property; (4) oath of the tutor to act as *bonus paterfamilias;* (5) charge on suspicion of wrongdoing for removal from his office (*crimen suspecti*); (6) *actio tutelae directa* against the tutor for general account on laying down his office; and (7) if a tutor had been appointed by a *defensor* who had exacted insufficient security or none, then in the last resort an *actio subsidiaria* against this *defensor*, or even against his heir, if the *defensor's* estate had been enriched out of the pupil's. Moreover, against a tutor, as against other persons, civil or criminal proceedings would lie on any definite charge of fraud or dishonesty. The tutor had a counter action of account (*actio tutelae contraria*) against his pupil for recovering any out-of-pocket expenses.

Tutorship was terminated in six ways: (1) attainment of the age of fourteen (or twelve) by the pupil;

(2) death of the tutor or pupil; (3) any *capitis deminutio* of the pupil or of a legal tutor, but only *maxima* or *media* of other tutors; (4) fulfilment of time or condition, if any were named in the will; (5) legal excuse arising after the tutor had taken up office; and (6) removal by the Court.

Cura existed in four cases, over (1) Adolescent, (2) Lunatic, (3) Prodigal, and sometimes (4) Pupil. (1) An adolescent could, and for his own convenience generally would, claim a Curator. In three cases he might have one forced on him against his wish, if (*a*) his debtor wished to pay him safely, or (*b*) his ex-tutor wished to settle disputed accounts, or (*c*) brought any action against him. A testator could not appoint a curator, but could recommend a name, and the Court would generally accept it. (2) Madmen (*furiosi*) and those of weak intellect (*mente capti*) must have a curator. So also must (3) *Prodigi* forbidden by the Praetor to manage their own affairs. (4) A pupil in three cases had a curator, if his tutor (*a*) was excused for a time only, or (*b*) was judged unfit but not on a ground which made him legally removable, or (*c*) brought an action against him. Practically all curators were dative and generally *honorarii*, *i.e.* appointed under Praetorian Law, but the nearest degree of agnates as *curatores legitimi* under the Civil Law of the Twelve Tables could still act for prodigals and madmen (not for *mente capti*). The curator of a madman had the custody of his person; other curators only managed the property, and had no *auctoritas*. The actions on disputed accounts between curator and adolescent were *actio negotiorum gestorum*, *directa* and *contraria*. It was not always necessary to appoint

a curator to a pupil whose tutor was excused for a time; the Praetor in his discretion might instead name an agent (*actor*), for whose acts the tutor would remain responsible. The Praetor could also aid an adolescent, whether or not he had a curator, by granting *restitutio in integrum*, *e.g.* relieving him from a contract by which he had unwisely bound himself.

Tutorship and curatorship were in two respects *publici juris*. (1) Any one nominated was bound to serve, unless he had a legal excuse, and (2) any man or woman might act as next friend by bringing the *crimen suspecti*. (1) Legal excuses may be ranged under three classes, (*a*) Public services, (*b*) Adverse position, (*c*) Incompetency. (*a*) Such services were the having three living children at Rome, four in Italy, or five in the provinces (this under a provision in *Lex Papia Poppaea*); absence on State business; being magistrate or head of the *fiscus*; being on the privilege roll of some learned profession; having already three other tutorships, nor could a tutor be compelled to stay on as curator to his ex-pupil. (*b*) Adverse position included any marked contrariety of interest, *e.g.* confirmed enmity between the family of the proposed tutor or curator and that of the minor, or (at the date of the Institutes) a lawsuit between the two. (*c*) Incompetency might be by extreme poverty, severe illness, or age over seventy. A minor, a soldier, and (by the Novels) a creditor or debtor of the minor were positively disabled from holding such office; so were women in general, only a widowed mother might by petitioning the Emperor get leave to be tutor to her children.

(2) Grounds for the *crimen suspecti* were fraud

(*dolus*) which entailed *infamia*, and negligence (*culpa*) which did not. There were two special cases of criminal prosecution against a tutor. It was his duty to apply to the Court to fix the amount for maintenance. If he failed to do so, the Court would give the pupil a writ of *missio in possessionem* over the tutor's property, and a sufficient amount of it would be sold by a special agent (*curator*) appointed for this purpose. If now the tutor did apply to the Court, but falsely alleged that the assets were insufficient to satisfy the order for maintenance, he was to be punished by the *Praefectus Urbi*. So also was any freedman tutor found guilty of fraud against his patron's son.

Thus we see that no person, though *sui juris*, obtained full control over his property till he reached twenty-five, *cum in statum suum pervenerit*, as Papinian phrased it. So far the term *persona* has been confined to family-membership. But elsewhere in the Institutes the family itself is termed a *persona*, especially when it is temporarily without a head, namely in the interval between the death of the *paterfamilias* and the entrance of an heir on the inheritance, which in the interim was called a *hereditas jacens*. The other principal case of a fictitious or legal person which occurs in connection with Private Law is a partnership of tax-collectors (*societas vectigalis*), if it had been, as it sometimes might be, incorporated.

CHAPTER IV

PROPERTY

I. Things

The Institutes now pass from the Law of Persons to the Law of Things (*Jus Rerum*). *Res*, like the English Thing and French *Chose*, is a word of wide application. Its legal sense includes everything capable of ownership or beneficial enjoyment. The Roman primary division was into (I.) Corporeal and (II.) Incorporeal things. I. Corporeal things were either (1) immovables (land and buildings) or (2) movables, which included live animals (*se moventes*). II. Incorporeal things were what we should call rights, *e.g.* inheritance, obligation. This expression "incorporeal thing" has been much criticized; it reminds the English lawyer of his "Chose (or Thing) in action," which is indeed a particular example of it. It must be confessed that in strict logic Law is always concerned with rights as much in the case of corporeal as of so-called incorporeal things. The distinction had come down to the later Romans from early procedure, when the plaintiff in a "real" action had to bring into Court the thing he claimed or a portion of it (*e.g.* a clod off the field he was suing for). But if

he was asserting a right of way over the defendant's field, there was nothing visible or tangible for him to produce and claim as his, and he was then said to be suing for an "incorporeal thing." So it was too if he claimed to stand in the position of heir, which involved numerous rights and duties; and again if his claim was on a contract by the defendant to perform some act.

Corporeal things are divided by Justinian into (1) things *extra patrimonium*, and (2) things *in patrimonio*; the latter were also called *res alicujus*. This second name shows that things *extra patrimonium* were at a given moment not actually in private ownership, whether or not they were capable of being owned. There were four sub-divisions, (*a*) Common, (*b*) Public, (*c*) Corporation property, (*d*) Unowned things (*res nullius*). (*a*) Things common to all mankind by the Law of Nature, as they expressed it, were air, running water, the sea, and the seashore. (*b*) Things public belonged to the Roman People, *e.g.* navigable rivers and their banks, harbours, etc. Also they distinguished between the seashore itself and "the use of the seashore," it being the business of the State to keep this free and open to all members of the *Populus* by preventing any private permanent occupation of it. Down to Justinian's Code provincial lands had also been *res publicae*. (*c*) Corporation property in its strict sense was almost confined to theatres, racecourses, and the like, held by municipalities for the public benefit. It is true that land, slaves, and other property, could be so owned, but these were generally held for the exclusive benefit of members of the corporation as *res alicujus*, so that

every member was individually a co-owner. (*d*) *Res nullius* in this connection comprised (i) *res sacrae*, (ii) *res religiosae*, (iii) *res sanctae*. (i) Sacred things were churches and their contents. (ii) Religious things were burying-places: a man could by burying consecrate any definite portion of his own land, unless there was a co-owner who objected. (iii) "Hallowed" things were gates and walls of cities protected by the "sanction" of capital punishment for any injury done to them: the name probably came from the ancient practice of dedicating such things to some tutelary deity, *sanctae* being thus a slight variation of *sacrae*.

But *res nullius* had also a very different meaning, being used of things fully capable of ownership, but not actually owned at the moment. Such were wild animals and other things noticed hereafter as acquired by occupation. Common and Public things as well as *res nullius* in its first sense could ordinarily never become *res alicujus* except by legislation, whereas some things falling under Corporation property might be sold or given to private persons. One other method of dividing things must be noticed, namely, into (1) *res singulae* and (2) "aggregates of things" (*universitates rerum*). An aggregate may be (*a*) simple, where all the items are of one kind, *e.g.* a flock of sheep; (2) it may be complex, being made up of rights and duties as well as tangible things. This latter is the general meaning of *universitas*, exemplified by an inheritance, a bankrupt's estate, etc. The distinction is important in considering modes of conveyance of property.

II. Acquisition.

Acquisition may be (1) simply investitive as when A by occupation vests in himself the ownership of a *res nullius;* far more often it is (2) transvestitive, as when A acquires property which B transfers or "conveys" to him. The Institutes enumerate six *tituli* (or *modi*) *acquirendi* applicable to *res singulae.* Four of these are described as *Jure Gentium, i.e.* really established by praetorian Law, and two *Jure Civili.* The first four are: (1) *Occupation,* (2) Accession, (3) Specification, (4) Delivery (*Traditio*). (1) Occupation is the taking possession of something which is a *res nullius* in its second sense. Nearly the only possible case of occupation of an immovable was when a new island arose in the sea, as is not uncommon in the Mediterranean. As for wild animals, if A wounded one and B captured it, it belonged to B, the actual taker, even if B was a trespasser on A's land. But if B took an animal alive and kept it, he had only qualified ownership, which he lost if the animal escaped and became again a *res nullius.* But as to deer and other tamable animals, there was a distinction. So long as the animal was tame, B was absolute owner, and the test of tameness was the habit of returning to its master, as a question of fact. Treasure trove (*thesaurus*), *i.e.* hidden so long that its original owner was unknown, belonged wholly to him who found it on his own land, no portion going to the State. But if A accidentally found it on B's land, by a law of Hadrian they shared it equally. Goods jettisoned from a ship were not *res derelictae,* and

were therefore incapable of occupation by a finder; it was theft, if he took them having reason to know what they were. Though land taken by a Roman army belonged to the State, enemies' movables were generally capable of occupation by a captor. The rules were different for property taken by the enemy from a Roman owner and recaptured by a Roman army or navy: private lands, merchant ships, slaves, and domestic animals, reverted to the owner by post-liminy; other kinds of property went to the army or navy as booty (*praeda*).

(2) Accession is the accrual of something as Accessory to a Principal thing. Three cases are noticed: (*a*) *Circumluvio*, (*b*) *Alluvio*, (*c*) *Fructus*. (*a*) *Circumluvio* (in this sense) is the formation of an island in a river by deposit of sediment. If wholly on one side of the mid-channel line (*medium filum*), it belonged to the nearest riparian owner on that side; if the line passed through the island, it was proportionately divided between the opposite riparian owners. (*b*) *Alluvio* is such gradual deposit as increases a shore or a river bank. Ordinarily this new land belonged to the adjoining owners. But if their lands were definite allotments of conquered territory (*agri limitati*), they had no right to increase, and the alluvium belonged to the State. A is a riparian owner; the river, by forming a new secondary channel and then rejoining the main stream, insulates part of his land (this also was called *circumluvio*). Or a flood tears away a strip of A's land and strands it alongside of B's, who is a landowner lower down. In both these cases A retained the ownership until the new position was decided to be permanent. But if the old channel

dried up and became new land, this was divided between the riparian owners.

(*c*) A much commoner and more important case was that of *fructus*. Fruits were Natural or Civil. Natural fruits were crops, timber, minerals, milk, wool, and the young of animals, but not children of a female slave. Civil fruits meant rent on lands and houses, but not interest on money lent. When the owner of the Principal was in actual possession, no question could arise as to the Accessory fruits. But a large proportion of Roman property was in the hands of some other than the legal owner, generally in the physical possession of a tenant-for-life (*fructuarius*) or a *bonâ fide* possessor, sometimes also of a *malâ fide* possessor. (i) The tenant-for-life got ownership of the fruits only by gathering or otherwise detaching (*perceptio*). (ii) The *bonâ fide* possessor had a right to windfalls of every kind as well as what he intentionally gathered. (iii) The *malâ fide* possessor had no right to either. On the death of an English tenant-for-life, ungathered crops form part of his estate as "emblements." But the Roman *dominus* claimed everything except fruits not only gathered but also consumed; such was his right against both the heir of the *fructuarius* and the *bonâ fide* possessor: from the *malâ fide* possessor he could also exact the value of all that had been consumed.

Seven other cases governed mainly by this rule of Principal and Accessory are stated in the Institutes: (*a*) Garment and purple, (*b*) Mixing of liquids (*Confusio*), (*c*) Mixing of solids (*Commixtio*), (*d*) Parchment and writing, (*e*) Painting on tablet, (*f*) Building with another's materials, (*g*) Building on another's land.

(*a*) A by honest mistake weaves B's purple into his own garment. The purple, however great its value, being Accessory, A owns the whole, but B can bring a personal action (*condictio*) for the value of the purple. (*b*) A mixes some of B's wine with his own, or melts together B's gold with his own silver; here each is equally Principal, and the now inseparable product is the joint property of A and B. (*c*) A mixes some of B's wheat with his own; theoretically they are still divisible and remain the property of their respective owners, but in practice the Judge apportions to each his fair share of the mixture. (*d*) A writes or employs a scribe to write on B's parchment: here the parchment is Principal, and B remains owner, but cannot recover it from A without paying him any cost of writing, *e.g.* gold letters or illumination. (*e*) A paints on B's tablet: here it had long been settled that the work of Art was Principal, the tablet Accessory. If B was in possession, A, as legal owner, could recover the painting by real action (*vindicatio*), but must pay B the value of the tablet. If A was in possession, B though not legal owner was allowed *vindicatio utilis* for the value of the tablet, suing "as if" he were still owner of it. (*f*) A in building on his own land uses some materials of B's. The maxim *Quidquid inaedificatur solo, solo cedit* (adopted in English Law) makes the land Principal and the building as a whole Accessory. But here the Roman lawyers rather casuistically distinguished the materials from the building itself. The Twelve Tables forbade B to damage the building by removing his materials, but gave him instead an action *de tigno injuncto* for recovering double their value. If the building fell or was taken down by legal

authority, B could reclaim the materials themselves. (*g*) A builds with his own materials on B's land. Here again the building accrues to the Principal land, leaving the question of the materials *per se*. Generally, perhaps, A would have built when in *bonâ fide* "legal possession" [1] of the land. If now B as legal owner sued for recovery of the land, B must offer to compensate A for its increased value, which would be *primâ facie* estimated by reckoning up the cost of the materials and workmen's wages together with any special circumstances: if B failed so to offer, A could defeat his action by putting in a plea of fraud (*exceptio doli mali*). If A had only *bonâ fide* "physical possession" (*detentio*),[2] but could show that he never intended to part with the materials, and if further the building was lawfully pulled down, then the Code allowed him to reclaim the materials. In any other case A lost the materials. Where A had planted his own trees on B's land, his ownership continued until they were seen to have firmly taken root.

(3) Specification is making a new thing (*species*) out of materials so that they cease to exist in their old form. Justinian laid down a rough and ready rule for determining the ownership. If the new thing could be restored into the old form of its materials, then the owner of the materials was to be owner of the manufactured product, *e.g.* if A cast a bust out of B's bronze ingot, as this could be melted back, B was owner of the bust. If the old form could not be restored, the manufacturer was to be owner, *e.g.* if A made wine out of B's grapes, it was A's. The rule was a compromise. The Sabinians had held that the new thing

[1] P. 50. [2] P. 50.

always belonged to the owner of the materials. The Proculians gave it always to the manufacturer. The Judge would decide whether the man who lost ownership deserved compensation. If the materials were partly A's and partly B's, it was and always had been law that A, the manufacturer, was owner.

(4) *Traditio* or Delivery became under Justinian the principal form of conveyance, far more important than the other three modes of acquisition. Before his time it could be used only for provincial lands and for goods known as *res nec mancipi*.[1] Two conditions were necessary for conveyance of ownership by delivery. (*a*) The transferor must be owner and intend to pass the ownership. (*b*) The transferee must receive actual possession and intend to become owner. For obviously delivery can be used for other purposes than transfer of ownership, *e.g.* if A lends a horse to B by delivering it to him. Generally intention must be proved by evidence and examination of circumstances. But sometimes the intention might be presumed. In sale, however, it was never to be inferred from the mere fact of delivery. Delivery itself also might be constructive, especially in four cases. (i) *Traditio longâ manu* was when A pointed the thing out to B, and invited him to take possession of it. (ii) *Traditio brevi manu* was when physical possession (*detentio*) had preceded, *e.g.* A having lent a horse to B and so given him *detentio* expresses his intention of giving B the horse, B must then sufficiently express his intention of accepting the offer. (iii) Virtual delivery: A hands B the key of a warehouse with the intention of passing to him the property in the

[1] P. 150.

goods therein: here the key is not a mere symbol, but the actual means of exercising power over the goods. (iv) *Constitutum possessorium* was where A announced to B that henceforward he held certain property hitherto his own for B, thus making himself what we should call bailee or trustee for B, who thereby became praetorian or equitable owner, and could take possession when he chose. Mere agreement to deliver, verbal or written, was in Civil Law insufficient to pass property, the maxim being *Non nudis pactis dominia transferuntur.* Therefore even in Case (iv) B could not bring *vindicatio* (a Civil action) to enforce the agreement; on the other hand, if he had taken possession, and then A pretended that the property had not passed, and brought *vindicatio* to recover the thing, B could set up the *pactum constituti* as a good defence.

There remain the two titles of acquisition referred by Justinian to the Civil Law, Usucapion and Gift. But before looking at these it is well to examine the Roman conception of Ownership and Possession. We may describe Ownership as the largest aggregate of rights *in rem* that is recognized by Law. From the beginning of their legal history as known to us the Romans were civilized enough to admit ownership of land as well as of movables. In both cases, and more particularly as regards land, they considered ownership (*dominium*) as an integer made up of fractional rights. Two of these were essential and all but inseparable from the ownership, namely, the right of claiming as one's own (*jus habendi*) and the right of alienating or (in many cases) destroying (*jus abutendi*). Other rights, such as possessing, using, enjoying the fruits (*jura possidendi, utendi, fruendi*), might be separated

off and vested in others. Thus the legal owner might have nothing but bare ownership (*nuda proprietas*), or having something more than this might still fall short of the whole, some other person being *possessor*, *usuarius*, or *fructuarius*, etc., as the case might be. Down to the date of the Code, the true legal owner was known as *dominus ex jure Quiritium*. But he was often out of possession, and the man who was in actual possession, and in his neighbours' eyes the apparent owner, might or might not have "legal possession." Some possessors were said to have the land or other thing *in bonis*. This so closely resembled ownership that the Greek commentator Theophilus called the respective rights of the legal owner and the legal possessor "Quiritarian" and "Bonitarian" ownership. The State was the legal owner of lands outside of Italy, but itself through its Courts protected private persons in their virtual ownership of such lands.

Possession may be any one of several kinds. Lowest of all is the *malâ fide* possession of a thing by a thief or other fraudulent person. Besides this, there are three kinds of *bonâ fide* possession. (1) A may possess a thing, honestly though erroneously believing himself to be owner, *e.g.* he may have bought it from B, thinking that B was owner, whereas he had not the ownership to convey, for *Nemo dat quod non habet*. (2) A may hold it, knowing himself not to be legal owner but intending to act as if he were, so far as the Law allows, *e.g.* if A is a foreigner, and ownership of land by foreigners is in theory illegal, but is practically undisturbed. (3) A may have mere physical detention, without any belief or intention of

being owner, *e.g.* if he has a horse lent to him by B for an indefinite period. Till Justinian's Code there were five principal branches of possession, all being examples of (1) or (2) above: two of these were abolished before his death. The five were: (1) Provincial landholding (*possessio* proper), (2) Alien ownership (*dominium ex jure gentium*), (3) Conveyance from a non-owner (*dominium bonitarium*), (4) *Bonorum possessio* by a praetorian heir, (5) *Missio in possessionem* granted to creditors of a bankrupt, and to some others. But the First Code soon established actual legal ownership of provincial lands, thus doing away with (1); later the Novels abolished (4) and made the praetorian heir to be the true legal heir. Thus alien ownership, bonitarian ownership, and *missio in possessionem* survived.

I. We can now look at Usucapion. This was acquisition of ownership over the property of another by length of adverse possession of a certain kind and subject to certain conditions. Here three points call for explanation. First, adverse possession is where the one keeps possession of a thing not by licence from or understanding with the other, who is owner, but in spite of or irrespective of this other's claim. Secondly, the kind of possession required was such as the Praetor protected by interdicts, hence called legal or Interdict-possession. Such interdicts protected the possessor in all the five branches above, but were not granted to the man who had merely *detentio*, and of course not to the *malâ fide* possessor. Thirdly, the conditions were four: (*a*) absence of *vitium*, (*b*) *justa causa*, (*c*) *bona fides*, (*d*) time. (*a*) *Vitium* was fault or defect in the thing itself such as to disqualify it

from becoming the possessor's property. Thus there could be no usucapion of a *res publica*; this until the First Code shut out provincial lands. Nor could there be of a *res fisci*, nor of any *res sacra, religiosa*, or *sancta*. Usucapion of anything stolen (*res furtiva*) was expressly forbidden by the Twelve Tables and by a *Lex Atinia*; also of a thing taken by violence (*res rapta*) by *Lex Julia et Plautia*. But a *res furtiva* was purged of its disqualification, if it came back into the hands of the owner or of a mortgagee. (*b*) *Justa causa* was any title of acquisition recognized by Law, especially sale, gift, inheritance, or legacy. (*c*) The question of *bona fides* becomes pertinent when the possessor has made a mistake. This must be (under *Jus Commune*) an excusable mistake of fact, not of Law, for *Ignorantia legis non excusat*. Thus it was excusable for A to think that B, the usufructuary, was owner and buy the property out and out from him. But it was inexcusable if he knew B to be usufructuary, and thought that as such he had the legal right to sell the child of a female slave to A Even a mistake of fact about the kind of *titulus* was fatal, *e.g.* supposing that to be a gift which was intended as sale. On the other hand, *Jus Singulare* gave the Praetor discretionary power to relieve against even a mistake of Law made by a woman, a minor, or a soldier. *Bona fides* was required only at the moment of obtaining possession; if the possessor subsequently discovered his mistake, this did not interfere with usucapion. (*d*) The needful length of time was three years for movables; ten years for land, if owner and possessor were both in the same province (*inter praesentes*); twenty, if they were not

(*inter absentes*). This was settled by the First Code. Till then the old rule of the Twelve Tables had been in force: this gave one year for movables, two for immovables. But later the Praetor, for the benefit of provincial landholders and others, had established the system of "Long Possession," absolutely assuring the holder in his holding, after ten or twenty years, as the case might be. The fundamental difference between Usucapion and Long Possession was that the first in due time gave ownership, the second never did. Thus if Titius, a resident at Rome, had lands on each side of the Adriatic, he was or might become legal owner of those on the western side, but could never be more than possessor of those on the eastern side. If Titius had occasion to go to law in respect of his lands, the whole nature and procedure of his remedies would differ in the two cases. After the Code Titius would be owner of the one as fully as of the other. It is to be noticed that the old Civil time for usucapion of movables was tripled, and the times for immovables borrowed from the Praetor's rule for Long Possession. Though possession still continued in four cases, and after the Novels in three, we often find the terms Usucapion and Long Possession used indifferently as synonyms, where the first would be the more exact name. But the really important distinction was now between *possessio* proper and *detentio*: of the man who had the first they said "*possidet*," of the thing "*possidetur*"; of the man who had merely the second they said "*in possessione habet*," and of the thing "*est in possessione*." Thus the noun *possessio* was ambiguous; generally it meant interdict-possession, but sometimes (as in the above

phrases) mere physical possession. To avoid confusion we shall henceforward call this last "detention."

There has been much dispute about the origin of interdict-possession. Perhaps the most probable view is that the early Praetor began it for the first class of cases that was likely to come before him for relief, *i.e.* purchasers from a non-owner. Then he gradually extended it for the benefit of aliens, provincial landholders, and others.

Interruption by the adverse claimant (*usurpatio*) was (1) Natural, or (2) Civil. The first was by taking possession, if he had the opportunity: the second by bringing an action. The latter caused no formal interruption of Usucapion till judgment, but interrupted Long Possession as soon as issue was joined (*litis contestatio*). In another respect Long Possession was more favourable to the possessor; when the period was complete, he was quite safe against any claims being started by way of mortgages, rights of way, or other incumbrances. But he who took by the title of usucapion took *cum onere*, *i.e.* subject to any such claims by incumbrancers, who could still spring them upon him. Usucapion was sometimes known as *Praescriptio*, because it was so commonly pleaded as a defence, and was then "written-before" the rest of the pleading (*formulae*). Successive holding by two or more (*continuatio* or *conjunctio temporum*) counted in two cases: (1) by an enactment of Severus between seller and buyer; (2) as confirmed and extended by Justinian, between a deceased holder and his heir. Thus if the deceased had held land for nineteen years in possession (*inter absentes*) when he died, his heir would acquire ownership in a year

instead of having to wait for twenty years' possession by himself. Theodosius introduced a period of thirty years (*possessio longissimi temporis*), which gave the possessor complete security, even though *vitium*, or absence of *bona fides* or of *justa causa*, could be proved against him. Justinian here made two changes: (1) after thirty years ordinarily the possessor, however bad his original title, became owner; but (2) if the property had been ecclesiastical or imperial land, the period was fixed at forty years.

If property came by mistake to the *fiscus* or to the Emperor or Empress, after the *fiscus* had sold, or the Emperor had given it away, the purchaser (by a law of Zeno) or the donee (by a law of Justinian) at once became legal owner. Suppose now the mistake to be discovered, as want of *justa causa*, or existence of *vitium*; either would have prevented usucapion, and reinstated the original owner in ordinary cases. But here, though the new owner could not be disturbed, four years were allowed in which this former owner might recover the value from *fiscus*, Emperor, or Empress.

II. Gift (*donatio*) was really a *causa*, but not a *titulus acquirendi*. For gift is in itself a mental intention, which needs some form of conveyance to make it overt and effective. This form was delivery. Gift was referred to the Civil Law, certainly not because it specially descended from the old Roman Custom or from any ancient statute, but because apparently a number of newer laws had restricted or otherwise affected it. There were three kinds: (1) *Mortis causâ donation*, (2) *Inter vivos*, (3) *Propter nuptias*. (1) This first resembled legacy, with two

differences, (*a*) a gift took its full effect immediately on the donor's death, while a legacy waited for an heir to enter on the inheritance. (*b*) An alien, or a *filiusfamilias* with his father's leave, could thus give (but not bequeath) any of his property. The gift, as its name imports, must be made in contemplation of the donor's death by some *instans periculum*, *e.g.* sickness, impending battle, etc.; it must be constructed so as to take effect only on such death, otherwise to be revocable. It could be cast in either of two forms. (i) The donor might give only possession, deferring the ownership till his own death. Or (ii) he might give immediate ownership, but so as to be defeasible in case of his surviving. In either form, if he did survive, and if the donee tried to keep the gift, the donor had *vindicatio* to recover it.

(2) Gift *inter vivos* was the more ordinary case. We should distinguish (which the Institutes do not) between an agreement to give, which may have preceded, and the gift proper or passing of the property. The policy of the older Law was against both, and was suspicious of anything beyond small birthday and New Year presents. Under Justinian, a gift always required actual delivery: if it exceeded 500 *aurei* (before his time it had been 200), it further needed registration (*insinuatio*), which might precede or follow delivery. If it was not registered, the excess over 500 failed. But registration was not required for a gift in the shape of military reward, or one for redeeming captives or rebuilding after a fire. An agreement to give, if made by the formal contract of stipulation, had always been binding. An informal agreement to give was *nudum pactum* and void, till Constantine

made it binding, if in writing. Justinian going further made even a verbal *pactum donationis* binding, so that he who had promised was compelled to deliver and (where necessary) to register.

(3) *Donatio propter nuptias* has been already noticed in connection with *dos*. It is only necessary to add that it was originally antenuptial. Justin allowed it to be increased after marriage. Justinian in permitting it to be first created after marriage changed the name from *ante nuptias* to *propter nuptias*. Thus, contrary to the English rule, a postnuptial settlement by the husband was of equal force with one made before marriage.

Three other modes of acquisition must be noticed. (1) Justinian on his accession found and amended a mode of acquisition by accrual (*accrescendi*). If A and B were joint owners of a slave C, and A alone professed to manumit C, the manumission failed, and B became sole owner of C. Justinian enacted that C should be free, but that A must compensate B for the loss of his share. (2) *Lex* corresponded to our Private Acts for settlement of estates, enclosure of waste lands, and could be used for alienation of Corporation property or even of *res publicae*. (3) *Adjudicatio* vested property in individuals by the decision of a Court in partitioning joint property or resettling boundaries: it will be again referred to under the head of "Mixed actions."

III. Rights *in re*.

Rights *in re aliená*, or shortly *in re*, are more or less limited rights over another person's property. They fall into two natural groups, Indefinite and

Definite, according as the right is wide and complex, *e.g.* mortgage; or is restricted and simple, *e.g.* rights of way. In the first group the owner of the right *in re* nearly always had possession or detention, in the second he never had either over the corporeal thing.

I. The Indefinite or first group included eight kinds:—(1) *Emphyteusis*, (2) *Superficies*, (3) Tenancy-at-will (*precarium*), (4) Mortgage, (5) Usufruct, (6) Use, (7) Habitatio, (8) *Operae servorum*. The first three had strong resemblances to one another, the fourth is quite distinct, the last four are varieties of a single type. In all the eight (except one form of mortgage) the man who had the right *in re* might be easily mistaken by his neighbours for the real owner.

(1) *Emphyteusis* was a perpetual or at the least a very long lease, subject to payment of a small quit-rent (*canon* or *pensio*). The name came from parts of the Imperial waste lands being so let for planting on (*agri emphyteuticarii*). The legal owner might thus be the Emperor, or might be the State, a municipal or other corporation, or a private person. The occupier (*emphyteuta*) could sell the land: the *dominus* had then the choice either to exercise his right of pre-emption or to claim a fine (*vindemium*) of two per cent. on the sale-money. If the *dominus* was a private owner, the land was forfeited to him on the rent falling into arrears for three years; if a municipal or (under the Novels) a charitable corporation, on two years' arrears. So too, if the *emphyteuta* left no heirs, the land reverted to the *dominus*. (2) *Superficies* was a similar right over houses or buildings, generally built by the *superficiarius* under express agreement with the *dominus*. An *emphyteuta* or *superficiarius*

had his legal action of *vindicatio utilis*; this shows he was a quasi-owner. He also had the protection of interdicts; this shows he had full legal possession. (3) Tenancy-at-will was created by an informal agreement (*pactum*) between the owner (*precario dans*) and the occupier (*precario rogans*). The owner could at any time give notice to quit; unless and until he did, the occupier had interdict-possession against all third persons. Thus (1), (2), and (3) might, and apparently often did, last in perpetuity or nearly so.

(4) Mortgage differed materially from all other kinds in this group, being a subsidiary right *in rem* for securing to a lender his right *in personam* against the borrower; it was therefore intended to be temporary. *Pignus* (or *jus pignoris*) included all forms of what we call mortgage and pledge. An English legal mortgage conveys the ownership of the property, with a trust for reconveyance on repayment, and a proviso for foreclosure on non-payment. The oldest Roman form (*mancipatio contractâ fiduciâ*) closely resembled this, the proviso for foreclosure being termed *lex commissoria*. This form became obsolete, and under Justinian the two forms were (*a*) *Pignus* proper, and (*b*) *Hypotheca*. (*a*) In *pignus* the debtor gave possession (not ownership) of the land or chattel he offered as security. The creditor generally had only bare possession, *i.e.* he could not use the thing for profit: if by express agreement he could, this was *antichresis*, and the profits replaced or lessened interest, as in our "Welsh mortgage." But form (*b*) *Hypotheca* became commoner; it was created by the pact so called. The creditor in this form had neither ownership nor possession of the security; the debtor merely gave him a charge on it.

Both *pignus* and *hypotheca* gave the creditor an implied power of sale over the security; this was exercisable only on non-payment by the time fixed (if any), or if no time was fixed, then after two years from demand for repayment; if in two years more no purchaser was found, the creditor became owner of the security, as in the old foreclosure. Hypothec was often tacit, by operation of Law; examples were the case of a pupil over his tutor's property (as we have seen), a wife for her *dos*, and a landlord for rent. If there were several hypothecs on the same property, the first had generally the preference (*prior tempore, potior jure*), but a registered hypothec was preferred to one unregistered. And if A, B, C, were successive mortgagees, C might pay off A's claim, step into his shoes, and so get priority over B, as in English "Tacking."

(5) Usufruct was an important right *in re:* it was the *jus utendi fruendi* detached from the *dominium* and vested in another person, the *fructuarius*. His large powers left the legal owner nothing but *nuda proprietas*, *i.e.* the reversion, with the present right of interfering only if the *fructuarius* abused his opportunities to the detriment of the reversioner. We should call the *fructuarius* a "limited owner," limited partly by time, partly by provisions for the restoration of the property in good condition. The time was generally the life of the usufructuary, so that we often translate *fructuarius* by "tenant-for-life." But if the *dominus* was a corporation, the time was a hundred years, and occasionally a private person had a fixed usufruct for so many years. The *fructuarius* was anomalous as to possession: knowing himself not to be owner, he could not have *bonâ fide* legal possession, so he was said to have "quasi-

possession," and was protected by special *interdicta utilia*, framed to suit his case. His powers were (*a*) to occupy and use the property (*jus utendi*), and (*b*) to take the natural or civil fruits (*jus fruendi*). Usufruct might be of almost any kind of property, but was most commonly of land with all on it at his entry. He could not fell timber without absolute necessity, but under the head of fruits could lop pollards and cut underwood (*silva caedua*), work existing mines, and even open new ones (a power disallowed to the English tenant-for-life). His duties were (*a*) to give security on entering (*cautio usufructuaria*), and (*b*) to act as *bonus paterfamilias* by keeping up the property in good condition and not committing "waste," which mainly consisted in cutting grown timber, damaging buildings, or altering the character of the property, *e.g.* turning farming into building land or *vice versâ*. The usufructuary of a flock or vineyard must, as far as possible, keep up the full number of sheep or of vines. If he sold, let, or gave the enjoyment of his rights to another, as between himself and the *dominus* he still remained accountable as *fructuarius*, but towards this third person he would be a kind of trustee, bound to allow him the benefits contracted for.

Usufruct was created by formal contract of stipulation or informal pact, or still more commonly by will. A testator might give it in three ways. (*a*) He could simply bequeath it to a legatee; the reversion then impliedly went to the heir. (*b*) He could bequeath the property to a legatee, expressly deducting the usufruct, which would impliedly go to the heir. Or (*c*) he could expressly bequeath the usufruct to one legatee and the *dominium* to another. Just as in England

large landowners are generally tenants-for-life, so it seems that a wealthy Roman sometimes made a son usufructuary, and gave the reversion to that son's son, who at the date of Justinian might be one as yet unborn. Usufruct was terminated in at least six ways. (i) Death of *fructuarius*, or efflux of time, if any were fixed. (ii) His *capitis deminutio*, *maxima* or *media*, but not (under Justinian) *minima*. (iii) Forfeiture, whether for ordinary waste, or for breach of some express restriction, *e.g.* not to use certain pastures except in summer. (iv) Destruction of the property whether or not by act of the *fructuarius*. (v) Surrender (*cessio*) of his right to the *dominus*. (vi) Merger (*consolidatio*), *i.e.* where the *fructuarius* himself became *dominus*, *e.g.* as heir on intestacy.

Quasi-usufruct was of things consumed in use and therefore incapable of complete restoration, *e.g.* a cellar of wine. If a testator professed to give a life-interest in such property, an early *Senatusconsultum* allowed him to enjoy it on giving security to the heir for the value of so much as he should have consumed in his life.

(6) Use was something less than usufruct. It varied, but never allowed of more than some very restricted right to fruits. Use of land allowed the *usuarius* to take produce for his daily personal needs, but not to sell it: the usuary of a flock, under a will, could take a little milk for his daily meals: the usuary of a house could live in it and invite guests, but not let it.

(7) and (8) were slight variations of (6): both *Habitatio* and *Operae servorum* seem to have been confined to gifts by will towards the maintenance of

younger children. Originally they were something short of ordinary use, but eventually it was held that under *Habitatio* the legatee could let the house or rooms, whenever he was temporarily away.

II. The Second or Definite group are known as Servitudes. This name is quite confined to the present group in the Institutes, especially in the expression *Haec de servitutibus* ET *usufructu*, though a single instance is known where a jurist, perhaps inadvisedly, called usufruct and use "personal servitudes." The servitudes proper were generally praedial, *i.e.* a man's right of way or the like depended on his ownership of a particular estate (*praedium*) which formed the *res dominans*, and was exercised over contiguous land, the *res serviens*. A few servitudes, on evidence of such intention, could be personal, *i.e.* belong to a defined person, whether or not he owned adjoining land. Thus there was always a *res serviens*, and nearly always a *res dominans*, but occasionally instead a *persona dominans*. Praedial servitudes were (1) Rural, relating to land, and generally in the country; or (2) Urban, relating to buildings, and generally in cities. (1) The chief and older rural servitudes were four, *iter*, *actus*, *via*, and *aquaeductus*. *Iter* was the right of foot or bridle path. *Actus* was right to drive animals or light vehicles. *Via* was right of carrying heavy traffic along a road bound to be eight feet wide and sixteen at turnings. *Aquaeductus* was right of leading water by an artificial channel across a neighbour's land. Minor kinds were right of drawing water at a neighbour's well (*aquaehaustus*), right of common (*jus pascendi*), of getting lime, sand, etc. The four major kinds, all consisting in privilege

without profit (English "Easements"), were strictly praedial. Most of the minor ones involved possible pecuniary gain (English "Profits à prendre), and might by express words be created as personal servitudes. (2) Urban servitudes were numerous, but there were again four major ones, *jus oneris ferendi*, *tigni immittendi*, *stillicidii*, and *non altius tollendi*. These respectively consisted in right of lateral support, of supporting a neighbour's beam, of receiving the droppings from his roof, and of not shutting off his light (English "Ancient lights"). Suppose a whole row or group of houses had this last right, each against all the others; and that then one obtained the exceptional right to build higher; this would be *jus altius tollendi*. Generally the owner of the *res serviens* had no active duty to perform, *e.g.* A was not bound to keep a road across his land in good condition for B's benefit. There was one exception: the owner of a house or building subject to *jus oneris ferendi* was *primâ facie* presumed to be responsible for keeping the lateral support in good order at his own expense.

Servitudes were naturally capable of being created by agreements or by will: they could be also in two special ways, (1) by *adjudicatio*, when a Judge was apportioning joint property; (2) in the case of rural servitudes by Long Possession. The latter was a praetorian rule continued by Justinian. Usucapion of two years, as it was in the Old Law, had been expressly forbidden for servitudes by a *Lex Scribonia*. As there was no *res corporalis* for the dominant owner to possess, he was said (like a usufructuary) to have "quasi-possession"; this gave him the protection of *interdicta utilia*. Servitudes were terminated in all

ways in which usufruct was terminated, but merger of servitudes was known as *confusio*. They were also extinguished by non-user for ten or (*inter absentes*) twenty years; under Old Law the period had been two years. *Confusio* so completely extinguished any servitude (*nulli res sua servit*) that, even if the properties became again divided, it could never revive, as an English "way of necessity" would do.

In both groups (omitting the peculiar case of *pignus*) the owner of the right could enforce it by an *actio confessoria*, as well as by interdicts. A *dominus* resisting some alleged incumbrance would bring *actio negatoria*. If a *jus in re* was challenged and the owner of it did not make good his claim within the ten or twenty years' period, the *dominium* was cleared of it (*usucapio libertatis*). In this word *libertas*, as in *servitus*, we see the Roman point of view, looking at the incumbrance on the *res serviens*. The English lawyer, looking rather at the benefit to the *res dominans*, calls it an Easement.

IV. Miscellaneous Points.

I. Acquisition through *potestas*. A family-head could acquire through (1) slaves and sons in his *potestas*; (2) slaves in his usufruct; (3) slaves in his *bonâ fide* possession. (1) Whatever a slave made by work or business, or received by inheritance, legacy, or gift, he acquired for his master, but only from the moment when the master knew and assented. For possession required intention (*animus*), and some acquisitions might bring more trouble or expense than

they were worth. And the slave might be a shop-manager, or a merchant captain trading as an apparent freeman on his own behalf, so that his master might not hear of a transaction till long afterwards. (2) If A had only the usufruct of a slave, some other, as B, had the ownership, and the slave might acquire for either. (*a*) Whatever he acquired by his own labour or out of property of A's in his hands, he acquired for A. (*b*) Any other acquisition went to B as the *dominus*. But suppose the slave received property from a non-owner, and so got only possession. This could not ripen into ownership by usucapion for A's benefit, and this for two reasons: (i) A had only quasi-possession of the slave, and (ii) knowing himself to be only *fructuarius*, he could not have the necessary *bona fides*. (3) If A was only *bonâ fide* possessor of a slave C, then C was either really a freeman (though for the time being in the status of slavery), or else he was the slave of some other owner: in either case A acquired through him, just as in case (2).

II. Son's *peculium*. Originally everything acquired by a *filiusfamilias* belonged to his father, and even under Justinian this would be so, unless some reason was shown to the contrary. For the old historic *peculium* of a son was exactly like that of a slave, a revocable allowance by grace of his father. This was afterwards distinguished as (1) *peculium profectitium*. But Julius Cæsar temporarily, and Titus permanently, had established (2) *peculium castrense*. This was merely one of the many privileges accorded to soldiers: it included every acquisition received by a son in respect of his military service, such as his outfit from whatever source derived, his pay, his share

of booty, etc. This was really his own, which he could keep or alienate *inter vivos* or by will. (3) *Peculium quasi-castrense*, a much later invention, covered all gains by the son in any of the higher offices of the Civil Service: this also belonged out and out to the son. Lastly (4) *peculium adventitium* was at first confined to gifts from the mother, eventually it included all property of the son which did not come under any of the other three heads. But his father had the usufruct of this for his life, the son having only the reversion or *nuda proprietas*. If the son remained *in potestate*, by a law of Honorius his father was bound to leave it to him unimpaired. But if the father emancipated him, he usually deducted one-third of this *peculium* as the "price of emancipation." For this Justinian substituted the usufruct of one-half, so that the emancipated son got half in immediate possession and the other half on his father's death.

III. Acquisition through strangers. A stranger, *i.e.* one not *in potestate*, could not in legal theory be agent for acquiring ownership for his principal. But when Severus had decided that he could so acquire possession, it followed that if he acquired this possession from the owner and for his principal, the ownership would go with it, if such was the express or implied intention of the owner. If he acquired from a non-owner, and the four conditions of usucapion were satisfied, his principal would in due time get the ownership.

IV. Powers of Sale. Generally the owner, and he alone, had unfettered power of selling, this being part of his *jus abutendi*. But in two cases the legal owner's power was restricted. (1) A pupil, as we saw in

Book I, could not sell or otherwise alienate without his tutor's *auctoritas:* this was only a partial restriction. (2) A more complicated case was that of a husband in respect of the *dos*. Theoretically he was legal owner, but he could not sell even dotal movables unless they were *res aestimatae*, *i.e.* subject to an express proviso in the settlement allowing him (and not his wife) the choice between returning the things themselves or their value. He could neither sell nor mortgage any dotal lands, even with his wife's consent. Under older Law a *Lex Julia* had allowed him to sell, but not to mortgage, Italian lands with his wife's consent, and to alienate provincial lands as he pleased.

In a few cases the Law vested a power of sale in some other than the owner. (1) A tutor or curator, where in his reasonable discretion he judged it necessary in the interest of the pupil or adolescent, could sell the minor's goods, but could not sell his lands without an Order of Court. (2) An *emphytenta* had, as we saw, a concurrent power of sale along with that of the *dominus*. (3) A creditor secured by *pignus* or by actual or implied hypothec had a similar concurrent power.

CHAPTER V

UNIVERSAL SUCCESSION

I. Will Proper

Having concluded the subject of acquisition of particular things (*res singulae*), we now turn to acquisition of aggregates (*universitates rerum*), of which inheritance is the most important. The succession to an inheritance is either testamentary or intestate. It is clear that in very early times intestate succession was the rule under the Roman Custom. Only two exceptions were allowed. (1) A Roman might petition the *comitia curiata*, or as it was called when meeting for such purposes, the *comitia calata*, to pass a special private law allowing him, as an act of grace and favour, to choose one in particular out of his legal heirs, or even a stranger, as successor to the inheritance. This was the will *calatis comitiis*. (2) A soldier on actual service, in the presence of the army as representative of the whole *Populus*, might name an heir: this form was the *procinctum*. Later a new kind of will appeared, in form a conveyance *inter vivos*. It is conjectured to have been invented by and for the benefit of the plebeians, to escape the annoyance of applying to the patrician *comitia*. This was the will *per aes et libram*

(also called *nexum*); its validity was confirmed by the *Uti legassit* clause of the Twelve Tables. Early will-making was thus open and irrevocable. Later, the heir's name followed by disposition of the property was written and sealed up, and the conveyance was made to a third person, called the *familiae emptor*, as trustee for the unknown heir: thus at last the will became secret and revocable. Later still, a praetorian form was admitted, which, however, made the testator's nominee only *bonorum possessor* till his claim should ripen by usucapion. We now arrive at the three kinds chiefly employed in Justinian's day. These were (1) *Testamentum tripertitum*, (2) Soldier's will, (3) Verbal will before witnesses.

(1) *Testamentum tripertitum*, dated from Theodosius II.; it was so called from the threefold origin of its conditions. (*a*) The making of it at one and the same time as one complete instrument (*uno contextu*) and the necessity for witnessing were both derived from Civil Law. (*b*) The sealing and actual number of seven witnesses were drawn from Praetorian Law. (*c*) The signing by both testator and witnesses was added by Imperial Constitutions. The Institutes add that the heir's name must be in the handwriting of the testator, or of a witness: this formality was repealed by the Novels. (2) A Soldier's will (*testamentum militare*) was an informal method allowed to soldiers on active service: it could be made either (i) by writing without witnesses, or (ii) without writing, but before witnesses called together for this express purpose. Such a will remained valid for only one year after the soldier's discharge, and any will he made when not on service must be in ordinary

civilian form. (3) A Verbal declaration of a testator's wishes made before seven witnesses was valid, and was a favourite form in Italy, probably among the less wealthy and less educated people. Of course, a written record might be taken down as evidence, but the legal essence lay in the open declaration and the praetorian number seven. This number was made up out of the five witnesses always necessary in any *mancipatio per aes et libram*, and two additional ones who represented the *familiae emptor* and the balance-holder (*libripens*).[1]

Public Law exacted three kinds of capacity. (*a*) The testator must be a person who had power of will-making. (*b*) Each witness must have power of testifying. (*c*) The heir must be some one having power of taking under a will. The first is called by the commentators *testamentifactio activa*, the third *testamentifactio passiva*. (*a*) Active capacity was confined to family-heads together with *filiifamilias* so far only as they had *peculium castrense* or *quasi-castrense*. Further, a testator must be over fourteen (a testatrix over twelve), and not insane, a deaf mute, or an interdicted prodigal. A blind man could make his will, but only in the presence of a notary (*tabularius*). Captivity suspended capacity, but a will made before capture remained good: if the captive returned, it was valid by postliminy: if he died a prisoner, *Lex Cornelia de falsis* by pronouncing such a will capable of forgery implied its validity, if genuine. (*b*) Incapacity for witnessing was either (i) absolute, as to all wills, or (ii) *sub modo* as to wills of particular persons. (i) Persons absolutely disqualified were slaves, women,

[1] P. 160.

infants, lunatics, deaf mutes, interdicted prodigals, and any one pronounced *intestabilis* for disgraceful conduct. If it was discovered afterwards that a witness had really been a slave at the time, this flaw could be remedied only by the Emperor on petition. (ii) No one could be witness who was connected by *potestas* with either the testator or heir (*domesticum testimonium*). The heir himself could not be witness; a legatee could be, as he did not, like the heir, represent the testator's person. English law would accept the testimony, but deprive such a witness of his benefit under the will. (*c*) Passive capacity was much wider, extending to citizens in general and their slaves; the principal classes incapacitated were aliens, deported (not relegated) persons, heretics, and apostates. Passive capacity was required at each of three dates, (i) at the making of the will, (ii) at the testator's death, (iii) when the heir entered on the inheritance.

In five ways a will might wholly fail so as to produce intestacy. It might be (i) invalid (*non jure factum*), (2) broken (*ruptum*), (3) invalidated (*irritum*), (4) unduteous (*inofficiosum*), (5) abandoned (*destitutum*). (1) Original invalidity included three subdivisions, (*a*) failure by incapacity of the testator (*injustum*), (*b*) by defect of witnesses (*imperfectum*), or (*c*) by incompleteness of disherison (*nullius momenti*). (1) Active capacity has already been noticed. There was imperfection equally if less than seven signed or if one witness was incapacitated. Disherison will be dealt with later. (2) *Ruptum* also covered two very different grounds. One was revocation, and a Roman will (unlike an English one)

was revoked by any later will which did not expressly confirm it. If it did confirm, but named a new heir, he was bound by all provisions of the first will which were not actually incompatible with the second. The other ground was quasi-agnation, *i.e.* the making of a new *suus heres* by arrogating or adopting after the date of the will. This "broke" the will, unless it so happened that the new *suus* was already instituted as an heir in the will. A's will institutes B, his son, and C, his nephew, as joint-heirs; afterwards A adopts C: this does not break the will. (3) Subsequent invalidity was by the testator suffering any *capitis deminutio*. If, however, he recovered his status and kept it till his death, the Praetor gave his heir *bonorum possessio secundum tabulas;* under the Novels this made him true legal heir. (4) A will was unduteous, if it unreasonably disinherited natural or adoptive children, or (in default of children) parents, or preferred infamous persons (*turpes*), *e.g.* actresses, to brothers or sisters. The Plaint of the Unduteous Will (*querela inofficiosi testamenti*) did not come before the Praetor, but went to the Centumviral Court. This plaint lay only if there was no other remedy, *e.g.* A, arrogated in infancy and then disinherited, could not bring it; his remedy was to claim his Antonine Fourth. *Sui heredes*, who were not disinherited, but received less than their reasonable share (*quarta*, or *portio legitima*) had also been allowed to bring the plaint. But Justinian altered this, and gave them instead a new *actio in supplementum legitimae* for making up the deficiency. A institutes B and C, his two children, and his nephew D: he can give three-fourths to D, but if he gives him more, B and C can bring this action. There

were three differences between the plaint and the action. The *querela* could be brought only by the immediate heirs of the testator, (*b*) within five (previously two) years, and (*c*) wholly avoided the will. The *actio* could be brought by the heirs of deceased heirs, without special limit of time, and left the rest of the will valid. The whole matter was remodelled by the Novels. Under them (i) a testator must specify an approved ground for disinheriting. Otherwise (ii), whether he disinherited or not, *sui heredes*, who received less than a third or a half of the inheritance among them, according to their number, could sue for the deficiency. But (iii) the will was to be rectified only in this respect, and not made in other respects void. (iv) The third or half must be by inheritance only, not (as had previously been allowed) by legacy or gift of any kind. Thus the Novels materially changed the meaning of *inofficiosum*. (5) A will became *destitutum*, if at the proper time no heir entered, he being dead, disqualified, or declining to enter.

We look on a will mainly as a devolution of property; it is not void for naming no executor, or naming one who declines to act. The original Roman will was essentially a device for identifying the new family-head; everything else was subsidiary. We have no personage precisely corresponding to the *heres*, but he was much like a combination of executor with residuary devisee and legatee. Institution of the heir, once compulsorily placed at the beginning of the will and in technical words, might under Justinian be in any words and in any part of the will. But all *sui heredes*, natural or adoptive, *in potestate* or emancipated,

must be either instituted or (for good reason) disinherited expressly (*nominatim*); otherwise the will was *nullius momenti*. Heirs were classified as (1) *sui heredes*, (2) *necessarii*, and (3) *extranei*. (1) Before Justinian's earliest reforms *sui heredes* were issue under *potestas*. But if either these or emancipated children were disinherited by general reference (*inter ceteros*) and not *nominatim*, the Praetor gave them a share known as *bonorum possessio contra tabulas*. (2) *Necessarius* was a testator's own slave, who was often instituted last in substitution for all preceding names, in case they should fail to enter. For this there was a practical reason, that it minimized the risk of the will becoming *destitutum*, as the *necessarius* could not refuse the inheritance. There was also a sentimental reason (as we should deem it): if the testator should happen to die insolvent, and his creditors should sell his goods, he preferred that this *ignominia* should fall on the freedman heir, and not on his own relations. (3) *Extranei* were all others whether relations, non-relations, slaves of other citizens, or a *servus hereditarius*, *i.e.* belonging to some *hereditas jacens*. In this way, when some heir at last entered on such an inheritance, he would find that through this slave he had further the option of claiming an additional property. If A institutes B, slave of C, when the time for entering comes, B may be still slave of C, or of D, or may have become free. Thus he might enter for the benefit of C, or D, or himself.

Two or more heirs may be named (1) collectively, or (2) alternatively, *i.e.* successively in substitution for earlier names. (1) The inheritance was *primâ facie*

likened to the Roman pound (*as*) of twelve ounces (*unciae*). To look at a few of the commoner fractions: *heres ex uncid* took $\frac{1}{12}$, *ex quadrante* $\frac{1}{4}$, *ex semisse* $\frac{1}{2}$, *ex dodrante* $\frac{3}{4}$, *ex deunce* $\frac{11}{12}$.

But a testator could make his *as* impliedly of more or fewer ounces, according as the total of named shares exceeded or fell short of twelve. The complications were when he did not specify the share of every heir. Thus if the total of those named was less than twelve, and one heir had no share specified, he took all the unnamed balance. If the named shares exceeded twelve, and there were also unnamed ones, the *as* was of twenty-four ounces (*dupondius*). Of four heirs, A is given $\frac{1}{12}$, B $\frac{2}{3}$, C $\frac{3}{4}$, D's share is left blank. The sum of the three being eighteen, D gets $24-\frac{1}{24}$ ounces, *i.e.* one-fourth of the inheritance. The maxim governing these calculations was "No one (except a soldier) can die partly testate, partly intestate": the will must be construed so as to cover the whole property. Nor could any one be named heir to or from a definite time (*semel heres, semper heres*). But institution could be conditional on any lawful contingency of uncertain date, *e.g.* return from a long voyage.

(2) Substitution was of three kinds, (*a*) Common (*vulgaris*), (*b*) Pupillary, (*c*) Exemplary. (*a*) "Let A be my heir; if he is not, then B; if he is not, then my slave C," sufficiently illustrates the simplest form. More complex instances were common. (i) A and B are joint heirs, with cross-substitution of A to B, and B to A. (ii) A and B are again joint heirs; B is substituted to A, and C to B. If neither A nor B enter, C takes the whole, B's share by express, A's by implied substitution (*substitutus substituto substitutus*

instituto). A's slave B was instituted under the mistaken idea that he was a freeman, and C substituted to him. The truth being proved, Tiberius decided that B entering at A's command should take half for A, and C take the other half. Sometimes a testator, having reason to fear that his will might be attacked as *inofficiosum*, etc., and hoping to frighten off any one from thus assailing it, would make the Emperor one of his heirs or a substitute. But Pertinax in an *oratio* to the Senate announced that the Emperor would never accept any benefit under a will the validity of which was doubtful. The substitute took in four cases. (i) When the instituted heir predeceased the testator. (ii) When he died afterwards but before the date for entry. (iii) When he declined to enter. (iv) When he was a disqualified person. One advantage of substitution was that it escaped the law of accrual (*jus accrescendi*). For if A and B were simply co-heirs, and A's share encumbered with legacies and charges which did not affect B's, and so A did not enter, B could not enter on his own share without also taking up A's share, which *ipso facto* would accrue to him. But if B, besides being heir, were also substitute to A, he could as substitute take his own share and refuse A's.

(*b*) Pupillary substitution was really the making of a will for a testator's infant child and heir, as a supplement (*sequela*) to the testator's own will. By this means, if the child with his tutor's *auctoritas* entered, and then died under fourteen, a named living substitute would take his place. But it was restricted to these exact conditions. (i) The heir must be an infant, and issue of the testator; (ii) he must enter

in infancy; (iii) he must not survive infancy. (*c*) Exemplary (or quasi-pupillary) substitution was an invention of Justinian. If a testator's child and heir was adult but insane, then to meet the contingency of his dying insane, the will might name a substitute: this must be a child of the lunatic, if he had any; if none, then a brother; if none, the testator's choice was unfettered. It was long a moot point whether the Common and the Pupillary forms implied each other, where only one was expressed. Marcus Aurelius settled this in the affirmative. For instance: "Let my son A be my heir; if he does not enter, let B be my heir." This is the Common form. But A (an infant) enters, and dies aged thirteen. B then takes, as though the Pupillary form had been expressed.

In relation to entrance on the inheritance (*aditio*), there were *beneficia* under four names in all, *separationis*, *abstinendi*, *deliberandi*, *inventarii*. (1) *Heres necessarius* must enter at once, but could then ask the Praetor for *beneficium separationis*: this empowered him to keep apart and free from creditors' claims any property he had acquired after the testator's death. (2) *Beneficium abstinendi* was granted to a *suus heres*, and (3) *deliberandi* to a *heres extraneus*, but in practice they were the same thing, fixing the time to be allowed to the heir for making up his mind to enter or not. The Praetor might give him from a hundred days to nine months, which the Emperor might possibly enlarge to a year. Meanwhile there was an offer (*delatio*) of the inheritance going on. An heir could accept by doing any act of ownership (*immixtio* or *pro herede gerendo*). If he let the time-limit expire without expressing either acceptance or refusal, then either

beneficiaries or creditors were sure to apply to the Praetor. If legatees or creditors applied, the Praetor would hold that the heir by his silence had accepted. But if the application came from the heirs *ab intestato*, whose interest lay in treating the will as *destitutum*, the heir's silence would be treated as a refusal.

(4) The celebrated *beneficium inventarii* of Justinian equally applied to *sui heredes*, *extranei*, and heirs on intestacy, and revolutionized Roman heirship. Hitherto the heir had been so identified with the *persona* of the deceased that by once entering he became liable to his own last *denarius* for every debt on the estate. This was the danger of a *damnosa hereditas*, demanding careful examination before deciding to enter. But now, though the inventory was not compulsory, the heir was encouraged to make it for two reasons. First, by making, and only by making, an inventory of assets he cleared himself of all personal liability. Secondly, we shall find that it was often well to be able to claim the "Falcidian Fourth,"[1] and this was forbidden to an heir who had neglected the inventory. The inventory, if made, must be finished within ninety days after the heir knew of his rights, being drawn up in the presence of a notary and witnesses. It greatly lessened, without perhaps quite destroying, the importance of the *beneficia abstinendi* and *deliberandi*.

Soldiers had eight privileges in relation to wills. (1) They could, as we have seen, when on service make an informal will. (2) They could disinherit *sui heredes* by implication, and not *nominatim*. (3) Their wills could not be attacked as being *irrita*. (4) Nor as

[1] P. 84.

inofficiosa. (5) They could institute members of some classes which had not passive capacity. (6) They could leave their property partly testate, partly intestate. (7) They could from the first deprive their heirs of the Falcidian Fourth. And (8) they could draw back from a *damnosa hereditas* after having entered on it; this by an enactment of Gordian.

II. Legacy—Trusts—Intestacy—Insolvency.

I. A legacy was a *res singula* separated from the *universitas rerum* of the inheritance by a clause in the will. It therefore failed, unless the will itself was established by the entrance of an heir: hence too the legatee must have passive capacity. An English legacy is a gift of personalty: a Roman legacy was a gift of either land or goods not given to a sole heir. For it could be given to a co-heir, over and above his share of the inheritance. And even a fifth or other fractional part of the whole property could be given merely as a legacy; this did not make the part-legatee (*legatarius partiarius*) a co-heir with the instituted heir or heirs. No formality of language was necessary, provided the intention was clear. The subject-matter bequeathed might be a thing belonging to the testator, to his heir, or to a third person: in this last case, if the owner would not part with it, the heir must pay over its value to the legatee; if he failed to do this, the legatee could bring *condictio* against him for the amount.

Time of vesting the right to a legacy (*dies cedit*) often preceded the time for payment of it (*dies venit*). *Dies cedit* was *primâ facie* at the testator's death, but

liable to be defeated, if no heir entered. And a testator might expressly postpone it, or might make it conditional; *e.g.* "to A two years after my death," or "to B, if he shall marry." *Dies venit* was when the heir entered, unless this too was similarly postponed. If the legatee died between the times of vesting and payment, the legacy survived to his heir.

Eight examples are given in the Institutes, involving various points of Law and construction. (1) Legacy of a future thing, *e.g.* the next crop after the testator's death. (2) Legacy of yearly rents to A: this was impliedly for A's life only. (3) Legacy of a debt or of the security for its payment due to the testator (*legatum nominis*): this was extinguished by payment in the testator's lifetime; if still unpaid, his heir must see the legatee paid, and sue the debtor, if necessary. (4) Legacy of release to testator's debtor (*legatum liberationis*): this might on the wording be an absolute release barring all right of action; or it might merely enable the debtor, if sued, to defend by setting up the *exceptio doli mali*. (5) Legacy of a female slave with her offspring: if she died before *dies venit*, or even before the testator, her children passed to the legatee. So too, under legacy of a head-slave (*ordinarius*) with his deputies (*vicarii*), if he died, they went to the legatee. On the other hand, if a slave was bequeathed with his *peculium*; or land with everything on it (*fundus instructus*); or land with farming implements only (*cum instrumento*), in these three cases, if the slave died, was manumitted, or was sold, or if the land was sold, the whole legacy failed.

(6) Legacy of his *peculium* to the slave himself: this included any gains made by the slave between

dies cedit and *dies venit*. But under a legacy of A's *peculium* to B, such gains went not to B, the legatee, but to the testator's heir. The legacy of his *peculium* to the slave himself did not *per se* imply the gift of liberty; this required a fortifying context, *e.g.* A to have the residue of his *peculium* after balancing accounts and paying out of it any sums due to the inheritance; this would imply a final settlement, after which A would be a freedman. (7) Legacy of a specimen of a class (*legatum generis*), *e.g.* "one of my horses": this must be an average specimen, neither party could insist on the best or worst. But legacy of choice (*legatum optionis*) enabled the legatee to claim the best; if he died before choosing, his heir could choose; if there were co-legatees, and they disagreed, the choice went by drawing lots. The parties or the Court must settle whether the wording amounted to *legatum generis* or *optionis*. (8) The maxim *Falsa demonstratio non nocet* (copied by English lawyers) covered any question of name, description, ground of bequest, etc., and Roman Law liberally admitted outside evidence for explaining doubtful points in a will.

A legacy (like a will) might fail either (1) from some original defect, or (2) from subsequent change of circumstances. Under (1) were illegal and immoral gifts; gifts uncertain because their identity was not sufficiently ascertained; legacy of anything which at the date of the will belonged to the legatee himself, even though it had ceased to be his before the testator's death. For by the *regula Catoniana* a gift void at the date of the will could not be validated by any change before the testator's death. By this rule, if A instituted B and left an unconditional legacy to C, B's slave, this

legacy failed; if the legacy was conditional on C becoming free, and he was manumitted before A's death, the legacy held good: similarly, if C was heir and B legatee. Under (2) the principal heads were revocation of the legacy by a later will, and destruction of the thing bequeathed without fault on the heir's part. Analogous to this latter was the case where a testator bequeathed a slave and subsequently manumitted him. Any complete alienation by the testator raised strong presumption of the *animus revocandi*, but this could be rebutted by evidence that the testator still intended to benefit the legatee. But if the thing bequeathed was afterwards pledged, the presumption was that the heir must redeem it for the legatee. A legacy might fail under the maxim "Two titles to the same thing both involving gain without cost (*causae lucrativae*) cannot concur in favour of the same person." Both gift and legacy are gratuitous: if then A bequeathed land to B, and before A's death C, the then owner, gave it to B, B had no claim under the legacy. But if C had sold it to B, B could then recover the value from A's heir.

Two noticeable cases are legacies (*a*) of a debt due from the testator to the legatee, and (*b*) of *dos* to the testator's wife. (*a*) A owes fifty *aurei* to B, and simply bequeaths him that amount. If B finds it necessary to sue A's heir, he must sue for the amount as a debt, not as a legacy. But if the legacy contained some further advantage, *e.g.* by giving more than fifty *aurei*, or making the legacy payable earlier than the debt would be, it was a good legacy. (*b*) A legacy of *dos* actually received by the husband, even though no more in amount, was valid as being more advantageous

than the *dos* itself, because (i) it was more quickly recoverable, and (ii) was free from set-off, to which *dos* was liable. A bequest which ran "I bequeath to my wife her *dos*," the testator having never received it, was a nullity. "I bequeath to my wife the Sabine farm, being her *dos*," when it was not dotal land, was mere false description, and left the legacy valid.

Justinian validated four cases of legacy which had been previously void: (1) those inserted in the will before the heir's name; (2) given to uncertain persons; (3) expressed to vest a definite time before or after the death of a named person; (4) penal legacies. All unborn persons ranked as uncertain, except a posthumous child of the testator. But an uncertain member of a certain class had never been so disqualified, *e.g.* "whichever of my nephews walks first at my funeral." A legacy (or an inheritance) was penal, if given to one to punish another for doing or not doing something; *e.g.* "if my heir A marry B, let him give a hundred *aurei* to C," or "let C share one-fourth of the inheritance with him."

A legacy again might fail by becoming (*a*) *caducum* or (*b*) *ereptorium*. (*a*) A legacy lapsed, if before it vested the legatee died or lost his passive capacity. From Augustus till Constantine, under *Lex Papia Poppaea* it would have also lapsed wholly by the legatee being *coelebs* (bachelor or widower); and as to half, if he was *orbus* (without living children): the *caducum* went to qualified legatees or heirs; if none, to the *fiscus*. (*b*) a legacy became *ereptorium*, if between the times of vesting and payment the legatee became *indignus* on any one of various grounds, *e.g.* that his neglect had caused the testator's death, that he had

brought a frivolous *querela*. *Indignitas* was thus a sort of minor *infamia*: it left the rest of the will good, but the legacy or inheritance went away from the unworthy legatee or co-heir, like a *caducum*.

Under the Twelve Tables law it was possible to leave away nearly the whole property in legacies, reserving a mere nominal amount for the heir. This was often done, but naturally tended to make the will *destitutum*. To check this evil the *Lex Falcidia* was passed under Augustus. This law ensured one-fourth of the estate to the heir or among the heirs. The Falcidian Fourth was calculated on the amount left after subtracting debts, funeral and testamentary expenses, a small succession duty and the value of all slaves manumitted by the will. It was extended to meet three other cases besides legacies proper: (1) trust-legacies (*fideicommissa*), this by *Senatusconsultum Pegasianum*; (2) the same when charged on heirs under an intestacy, by Antoninus Pius; (3) *mortis causâ* donations, by Severus. Also it doubtless suggested the Fourth called *portio legitima*. But no heir could claim the Falcidian Fourth, as we have seen, unless he had made an inventory, and by the Novels a testator could forbid its retention by his heir.

II. Trusts in England may be *inter vivos* or *post mortem*, by settlement or will. At Rome an *inter vivos* trust was unenforceable. If A delivered and B accepted property for the benefit of C, and then B tried to keep it for himself, the Praetor ignoring C would make B refund to A. At first *post mortem* trusts were absolutely unenforceable. Indeed it was not until Augustus that trust-legacies and (perhaps a little later) trust-inheritances were generally recognized as valid, and

were soon placed under the jurisdiction of the newly created *Praetor fideicommissarius*.

The trust-inheritance was the more important, involving acquisition of a *universitas rerum*. For this there must be a will and an instituted heir. The testator, when considered as creator of the trust, was *fideicommittens*, the heir-trustee was *fiduciarius*, and the beneficiary (our *cestui que trust*) was *fideicommissarius*. A would request (*rogo* or *peto*) his heir B to hand over (*restituere*) the inheritance or a part to C, B all along remaining legal heir. It is now necessary to look at the laws which Justinian amended. (1) *Senatusconsultum Trebellianum* under Nero had enabled actions to be brought by or against C as well as B. If B had handed over the entire property and then was sued, the Praetor allowed him to plead the *exceptio restitutae hereditatis*. (2) *Senatusconsultum Pegasianum* under Vespasian had made two improvements: (*a*) B was allowed to keep his Falcidian (hence called also Pegasian) Fourth; (*b*) if he declined to enter, the Praetor was to compel him to enter formally and hand over three-fourths to C, after which he was liable to the extent only of his remaining fourth. So long as either the will requested B to hand over only three-fourths, or B entered by compulsion, he was protected by one or other of these enactments. But if the will asked him to hand over the whole, then whether or not he kept his fourth, he remained legally liable on the whole in the alternative with C. So in practice he entered into mutual stipulations with C. If he gave up the whole, he purported to sell it to C (*stipulationes emptae et venditae hereditatis*), and C took all responsibility and undertook to indemnify B against

any actions. If he kept his fourth, the two would agree to share the liability proportionately (*stipulationes partis et pro parte*). Papinian having stigmatized these stipulations as captious, Justinian fused the two *senatus-consulta* into one under the name of *Trebellianum*, abolished all necessity for the stipulations, and produced the same effect by mere operation of Law.

Trust-legacies obtained legal recognition in connection with *Codicilli*. Roman codicils were originally informal notes of direction to the heir respecting particular things and payments. They had always put the heir on his honour, but for a long time did not bind him legally. It happened that Lentulus in this way confided requests to Augustus himself for carrying out certain trusts. The Emperor then, with the approval of Trebatius and Labeo, leaders of the Sabinians and Proculians, made such trusts henceforward legally binding. *Codicilli* soon parted into two divisions, according as they were made by (1) a testator, or (2) an intestate. (1) In this case they could be made before as well as after a will (differing thus from an English codicil). A will usually confirmed existing codicils expressly, and subsequent ones by anticipation. But Severus enacted that any will which did not expressly revoke previous codicils should be taken to confirm them, provided they contained trusts, as they almost always did. Express confirmation was still necessary for giving ordinary legacies, *i.e.* not expressed as trusts, or for appointing tutors. And no codicils could institute an heir or substitute a new one. However informally expressed, they required writing, signing, and attestation by five witnesses.

(2) Codicils made by an intestate bound only his

heirs *ab intestato*. We have seen how full of pitfalls was a Roman will. Accordingly it became a wise precaution of later times to insert in the will a *clausula codicillaris*. So if the will failed as a will, it would still bind the heirs on intestacy as a codicillary trust. A testator would, for instance, end his will in this way, "And I desire that these provisions should hold good in whatever way (*quacunque ratione*) they may be valid," *i.e.* whether as will or codicils. Theodosius had required codicils (like a will) to have seven witnesses and seals, but Justinian demanded only five witnesses, and did not exact sealing.

Verbal trusts (also before five witnesses) had long been allowed. By Justinian's enactment, if a trust was alleged, but no writing could be produced, or only a writing insufficiently witnessed, the person who claimed to be a *fideicommissarius* could first swear that his claim was not frivolous, by taking the *jusjurandum de calumniâ*. He would then put the heir in turn on his oath to say whether or not he had undertaken such a trust. Thus trusts could be created (1) by will, (2) informally, including codicils or other writings, or (3) verbally. *Primâ facie* any one could take under a trust in the reign of Justinian, except probably those disqualified by *infamia* or *indignitas*. Previously aliens and uncertain persons had been sometimes excluded, sometimes admitted.

Inheritance could thus be claimed by a plaintiff suing as (1) civil heir, (2) praetorian heir (*bonorum possessor*), or (3) *fideicommissarius*. Until the Novels turned the praetorian into a legal heir, it would sometimes be easier, cheaper, and surer, to begin by claiming possession rather than heirship. English wills

often entail or otherwise settle property. It was quite possible for a late Roman to institute his eldest son as heir, and charge him at his death to hand over the family property to this son's eldest son with substitution of younger sons or remoter issue; if the testator's eldest son was an infant, these provisions would be strengthened by pupillary substitution. But such strict settlement seems to have been unusual; the favourite form was by imposing a trust not to let the estate pass out of the family.

III. Intestate succession is so full of intricate rules that a mere outline must suffice. The Civil Law succession had been to (1) *sui heredes*, (2) *agnati*, (3) *gentiles*, each later class coming in on failure of the preceding. (1) *Sui heredes* took by stocks or representation (*in stirpes*), *e.g.* A leaves a son B, two sons of a deceased son C, and three daughters of a deceased son D. here are three stocks comprising six persons; thus B gets $\frac{1}{3}$, C's sons $\frac{1}{6}$ each, D's daughters $\frac{1}{9}$ each, the grandchildren "representing" their parent and dividing his share. (2) Failing issue of the deceased (*propositus*), the proximate degree of agnates or paternal collaterals excluded any more remote: they took by heads or equally (*in capita*). (3) *Gentiles* were supposed members of the *gens*, too distant to count as relations: their succession was obsolete early in the Empire.

Praetorian reform consisted in the Praetor drawing up a scheme of relationship, and granting *bonorum possessio* to the first applicant who proved his place in it. If another later proved a higher place, the possession of the first was ineffective (*sine re*), that of the nearest who proved was effective (*cum re*). We need

refer to only some of the seven heads of the scheme. (1) *Unde liberi* included emancipated children: they had to bring into hotchpot (*collatio bonorum*) all property which would have been *peculium profectitium*, if they had been still under *potestas*. (2) *Unde legitimi* included, besides agnates, the mutual succession of mother and child: the mother's place here was derived from *Senatusconsultum Tertullianum*, the child's from *S. Orphitianum*. (3) *Unde cognati* included all blood relations who failed to take as agnates. (4) *Unde vir et uxor* gave the last place to mutual succession between husband and wife. The titles of these clauses were shortened from *Ea pars edicti unde* (*liberi*, etc.) *vocantur*. Justinian repealed the other three clauses, and gave to uterine brothers and sisters (*i.e.* on the mother's side) the right already given to consanguineous brothers (on the father's side) of excluding the mother.

The 118th Novel revolutionized intestate succession. It abolished all distinction between heir and possessor, agnate and cognate, male and female, making only three classes, (1) descendants, (2) ascendants, (3) collaterals. (1) All children took *in capita*, remoter issue *in stirpes*. (2) In default of descendants ascendants shared with brothers and sisters of the whole blood (if any). Half the estate went to paternal ancestors, half to maternal; and by the 127th Novel children of deceased brothers and sisters took shares *in stirpes* along with ascendants. (3) In default of ascendants, all collaterals of the nearest degree took; but among brothers and sisters the whole blood excluded the half, consanguineous or uterine: children of deceased brothers and sisters took *in stirpes*; more distant collaterals *in capita*. Our own Statutes of

Distribution for personal property are founded on these two Novels.

Succession to freedmen was complicated by the patron's rights. The Code gave the same four classes as in succession to a freeborn intestate. But (1) *Unde liberi* here excluded the freedman's adopted children; (2) and (3) were the patron's children (excluding only those adopted) and cognates to the fifth degree. The praetorian scheme had given certain rights to adoptive children of both freedman and patron; these were now abolished.

Degrees were reckoned by counting each birth except that of the *propositus* himself; *e.g.* his father and his son are in the first degree; his grandfather, grandson, and brother in the second. Heirs *ab intestato* were not bound to accept: if all of every degree declined, the *fiscus* could claim the property as *bona vacantia*. If even the *fiscus* declined it as worthless, but there was a will (though *destitutum*) which purported to manumit slaves, any one who gave security for full payment of creditors could have the inheritance assigned to him by Order of Court for the charitable purpose of carrying out the manumission. This *Addictio bonorum* was in part invented by Marcus Aurelius, and further developed by Justinian.

IV. Insolvency may become patent in the debtor's lifetime or transpire only after his decease. The cases were treated alike, if in the latter no one took up the succession. In earlier times the creditor's remedy had been by sale of the property as a whole (*venditio bonorum*): this was managed by a liquidator (*magister*) chosen by them with power to sell privately or by auction (*sub hastâ*); the buyer (*sector*) must get

confirmation from the Praetor. This *venditio* was obsolete before Justinian's time. In the later system the creditors applied to the Praetor for *missio in possessionem*. He named a curator to manage the estate for two years (later enlarged to four), during which creditors must prove their claims; the whole property was then sold in lots (*distractio bonorum*). If the insolvency had occurred by misfortune and not by the debtor's fault (*culpa*), he was allowed to make voluntary surrender (*cessio bonorum*) and so to escape *infamia* and risk of imprisonment.

Here we quit the acquisition of aggregates, and in the next chapter pass to Obligation: this, like inheritance, was regarded by the Romans as an incorporeal thing.

CHAPTER VI

CONTRACT

I. Obligation. The primary and most exact meaning of Obligation is the forming of a relation between two definite parties (*rei* or parties to a *res*), whereby one is entitled to some act or forbearance on the part of the other. The Romans, in a wider sense than we give the words, always looked on the first as Creditor, the second as Debtor. Two other meanings of *obligatio* were (1) The creditor's right, (2) The debtor's duty. The creditor's right, being against a definite person, was a *jus in personam*. "Act or forbearance" was denoted by three terms: (1) passing property (*dare*), (2) doing some other act as a primary duty (*facere*), (3) the secondary duty of compensating for omission or fault in carrying out *dare* or *facere* (*praestare*). An unsuccessful defendant was said *praestare culpam, dolum*, etc., *i.e.* he was responsible, and liable to pay the corresponding amount of damages. This was the pecuniary measure of the *res* in which the creditor's right consisted, much like what we call "a chose in action." A legal obligation differed from an obligation of honour by creating a legal tie (*vinculum juris*) between the parties. This tie was

essential, and was unloosed (*solvitur*) when the debtor performed his duty. Obligations were divided after three methods. The chief one, which we shall follow, was into (I) *Obligatio ex contractu*, (II) *O. quasi ex contractu*, (III) *O. ex delicto*, (IV) *O. quasi ex delicto*. Contracts rested on agreement; quasi-contracts on analogous circumstances, "as if" there had been agreement; delicts were the chief civil wrongs; quasi-delicts were similar wrongs not classed as delicts proper. The second method was division into (1) Civil, (2) Praetorian, (3) Natural Obligations. The third depended on the nature of the appropriate action, according as it was (*a*) *stricti juris* or (*b*) *bonae fidei*. Generally, Civil obligations were *stricti juris*, Praetorian *bonae fidei*.

II. Contract is enforceable agreement. Agreement (*pactio* or *pactum*) consists of (1) actual or implied offer (*pollicitatio*) by one party followed by (2) acceptance by the other. The addition of (3) *vinculum juris*, making it enforceable at law, turns agreement into contract: without this it remained a mere pact or the like. In the earliest contracts the *vinculum* depended on some solemnity of form, just as now our English Deed depends on the "solemnity" of its seal. There were three leading Formal Contracts: (1) *Stipulatio*, (2) *Expensilatio*, (2) *Nexum*, all Civil.

A. Formal Contracts. (1) *Stipulatio*. The word is probably derived from *stipulus* (strong or binding), though some Romans derived it from *stips* (coin). Its older name had been *Sponsio*, connecting it with libation at an altar to the National Gods. The Pontiffs would naturally see to the performance of promises so guaranteed. The actual libation presently dropped

out, but for ages the mystic verb *spondere* must be spoken, and to the last the question asked by the intending creditor (*stipulator*) would often be expressed by sticklers for form as "*Spondesne mihi* (*hominem Stichum*, or the like) *dare?*" And the intending debtor (*promissor*) would answer, "Spondeo." We see here first that stipulation consisted in question and answer; next that it was unilateral, binding only the *promissor*. To make a bilateral obligation, there would be a second stipulation; the original *promissor* would now become *stipulator* in his turn. Thus in sale, for which stipulation was often used, if A was buying from B, he stipulated for delivery, and B then proceeded to stipulate for payment of the price. Stipulation, as a Civil contract, was at first confined to citizens: later aliens were allowed such forms as *dabisne?*, *faciesne?*; later still citizens and aliens alike could use any words sufficiently expressing their intention. Nevertheless we may be sure that many would still stick to the old solemn words. Further changes came. A note of the transaction was often written out as a precaution. It was soon held that the written declaration, *Titius promisit*, implied a precedent question by the other party. Then Justinian enacted that a written declaration of the presence of both parties should afford the strongest presumption of its truth, rebuttable only by proof of *alibi*, fraud, etc. So the written note intended as merely evidence was accepted as practically the contract itself. Still there must be possibility of a verbal contract: it could not be made *inter absentes*, or between persons either of whom was a deaf mute.

Contracts can be made simply (*pure*) or conditionally. An important form of condition was the affixing

of damages or a penalty (*poena*) for non-performance. By this means the parties might agree on the pecuniary value of an act. Again, a stranger to the contract could not sue on it in his own name. But if A wished to contract with B for the benefit of C, he could stipulate "Do you engage to pay me twenty *aurei* or else ten to C?" Here was *poena* of ten extra *aurei* on non-payment to C, and the whole twenty could be recovered by *condictio certi*. "Do you engage to pay ten *aurei* to me and to C (not a party)?" Justinian decided that five were due to A, C's being a nullity: this had been the Proculian opinion, while the Sabinians held that this nullity vitiated the whole contract and left nothing payable.

Stipulations were said to be (1) Praetorian, (2) Judicial, (3) Mixed, (4) Conventional. Only the last were true contracts resting on agreement: the other three were forced on a party to an action by Praetor, Judge, or either. With equally little accuracy we term "entering into recognizances" a "Contract of record." Only the Praetor could compel promise under stipulation against apprehended damage (*damni infecti*) or for payment of legacies due at a future date (*legatorum*). If a plaintiff was suing for recovery of possession, a Judge could empower him to stipulate for return of the property in good condition, if the action should go against the defendant (*de dolo cautio*). Either Praetor or Judge could order a stipulation as warranty that the acts of an attorney (*procurator*) would be ratified by his principal (*de rato*).

Two minor contracts, verbal and formal, seem to have still been in occasional use. (1) *Dictio dotis* was an alternative for stipulation in the settlement of *dos*.

The intending wife or other settlor, instead of questioning, said "*Dos est* (so many) *aurei*," and the intending husband answered "*Accipio*." (2) *Jurata promissio operarum* was where a slave before manumission had already promised specified services to his intending patron, and now as a freedman ratified his promise on oath.

(2) *Expensilatio*, though referred to in the Institutes, had long been obsolete. It was once the only written contract: its form lay in the entry of a loan in the ledger (*codex*) of the creditor with the debtor's consent. It was confined to citizens. Aliens had more convenient forms in Note of hand (*chirographum*) signed by the debtor and kept by the creditor, or Note and Counterpart (*syngraphae*) being two copies, one signed by each and exchanged. Citizens and aliens alike eventually adopted Acknowledgment (*cautio*); this (like a written memorandum of a stipulation) was not technically in itself a contract, but merely *primâ facie* evidence that there had been a contract to that effect entered into. To prevent fraudulent denial long afterwards by the debtor, the *cautio* was made conclusive in Law after two years (before Justinian five). To prevent fraudulent claim by an alleged creditor, the debtor could within that period set up the plea of non-advance, or incomplete advance, of the loan (*exceptio non numeratae pecuniae*); if the period was running out, he could make this plea perpetual by entering a public protest to that effect.

(3) *Nexum*, the third formal contract, was obsolete long before Justinian. It suffices to say that it consisted in the debtor, as security for a loan, solemnly selling himself as bondsman (*mancipium*) to his

creditor; the sale was made *per aes et libram*, which formed the solemnity; it was to be carried into effect only on non-repayment by a fixed date, in which case the *nexus* would have to work out the claim by his bodily services.

B. Executed Contracts. (1) *Mutuum*. Formal solemnities are dear to the heart of semi-civilized man, but the growth of trade makes them inconvenient. So the Praetor gradually introduced simpler and juster ideas of contract. He began by taking Delivery as a ground for enforcing agreements. Executed contract then means for this purpose an agreement executed on one side by delivery. It now becomes equitable that the other party also should execute by performing his part. Every such contract must consist in a present act on one side which renders binding a promise for the future on the other side. The first contract thus admitted was *Mutuum*, loan returnable in kind. A, whose crop has ripened earlier, may agree to deliver at once so much corn to B, B later to return him a corresponding quantity. The agreement was not binding till it was executed on A's side by actual delivery. *Mutuum* applied only to things of a certain character, having three marks: they must be capable of being (*a*) weighed, measured, or numbered, (*b*) consumed by use, (*c*) represented by a sufficient amount of other things of the same kind (*res fungibiles*); in other words, they are returnable *in genere*, not *in specie*. Under (*b*) consumption of money consists in using it by parting with the particular coins in business. *Mutuum* was unilateral, the only ordinary duty being for the borrower to return an exact equivalent; this shows also that it was

gratuitous. The borrower got both possession and ownership, and consequently incurred no responsibility until the time for returning the equivalent. The lender's remedy was *condictio ex mutuo*, an action *stricti juris*.

(2) *Commodatum.* This is gratuitous loan returnable *in specie*. It marks an advance on the Praetor's part, as the delivery here passed neither property nor legal possession, but only gave detention. This being a unilateral contract for the lender's sole benefit, he was liable for even slight negligence (*culpa levis*); in other words, his responsibility was of the higher kind, that of a *bonus paterfamilias*, but he was not liable for the results of *vis major* or of inevitable accident, unless indeed he had expressly agreed to become an insurer of the thing lent. The only ordinary right of action was for *actio commodati* (*directa*) brought by the lender, if the borrower refused to return the thing after a fixed or reasonable time. But if the loan caused cost or damage unexpectedly, *e.g.* if A's horse lent to B needed a veterinary or proved vicious, the borrower had a choice between enforcing his lien (*retentio*) or bringing *actio commodati contraria*.

(3) *Depositum.* This also was gratuitous, unilateral, and solely for the benefit of the depositor, who desired safe custody for his property. The depositee (*depositarius*) was therefore liable only for fraud or gross negligence (*culpa lata*), except when he (*a*) expressly warranted safe custody against all risks, or (*b*) voluntarily persuaded the owner to deposit with him. In other respects the rules governing this contract were like those of *commodatum*. But three forms varied from the normal type: (*a*) *Depositum*

miserabile, (*b*) *Sequestratio*, (*c*) *Depositum irregulare*. (*a*) *Depositum miserabile* was when deposit was rendered necessary by sudden and serious accident, *e.g.* if goods salved from a burning warehouse or ship needed immediate storage. If the depositee then falsely denied receipt of the goods, instead of the usual praetorian action for return or value, he was liable to a special Civil action. This was under the Twelve Tables, and was for double the value (*actio dupli*). (*b*) *Sequestratio* was deposit with a stakeholder (*sequester*) by agreement between two claimants. The dispute might take long to settle, and the depositor, if he retained the legal possession, might thus acquire the ownership by usucapion. To prevent this the Law gave full possession to the *sequester*. (*c*) *Depositum irregulare* was deposit of money with a banker, with a collateral agreement for payment of interest on it. Here the banker had ownership, possession, and use of the money, which he would return only *in genere*. Thus this "irregular" form had a strong resemblance to *mutuum*, differing because (i) it was bilateral in effect, (ii) more particularly for the depositor's benefit, and (iii) the action was *bonae fidei*.

(4) *Pignus*. The rights *in rem* arising out of possession of a pledge have already been noticed. Here we are concerned with the contractual side consisting in delivery under an agreement. The delivery gave full legal possession. The agreement was bilateral: the debtor got a loan, the creditor gained security for repayment; the former had the duty of repaying, the latter of returning the pledge. The creditor was liable for *culpa levis*, responsible as *bonus*

paterfamilias. The debtor's remedy was *actio pigneratitia* (*directa*) for recovery of the pledge. The creditor had *actio pigneratitia contraria* for repayment. If the pledge got into the hands of a third person, the creditor recovered it from him by *actio quasi-Serviana*, also called *hypothecaria*, since it applied to *hypotheca* as well as to *pignus*.

We may summarize the effects of delivery in these contracts. It gave ownership and possession in *mutuum* and in *depositum irregulare*; possession in *pignus* and *sequestratio*; detention in *commodatum* and in the other forms of *depositum*.

The Praetor on advice from the *Prudentes* further recognized what were known as "Innominate Contracts," though some of them had specific names. An innominate contract was an agreement followed by performance on one side, but not falling under any of the above four heads. The agreement without more was *nudum pactum*, unenforceable for want of any *vinculum juris*. This was supplied by performance on the side of either party, who could thereupon, if necessary, sue the other. An innominate contract is thus a pact converted by part performance into an executed contract. The jurist Paul made a fourfold classification of such: (1) for passing property on both sides (*do ut des*), (2) passing it in consideration of an act yet to be done (*do ut facias*), (3) doing an act in consideration of future receiving of property (*facio ut des*), (4) doing an act in consideration of an act yet to be done (*facio ut facias*). Exchange (*permutatio*) was and is the most important example. A agrees to exchange his ox for B's horse: this so far is *nudum pactum*. A then delivers the ox accordingly:

this is now *do ut des*. The remedy on all innominate contracts was a *bonae fidei* action, the *actio in factum* (*praescriptis verbis*). It should not escape notice that the nominate contract *mutuum* is in principle a particular example of the innominate class *do ut des*.

C. Executory Contracts. A purely executory contract consists of promise for promise, without necessity of present performance on either side. This was a great step for the Praetor to take, and he took it haltingly and incompletely. In fact he merely picked out a few such cases, and gave right of action on them, leaving the rest as *nuda pacta*. Three of those he did select he honoured with the name of contract, others were distinguished as *pacta vestita*. This name included three divisions: (1) *pacta adjecta*, (2) *pacta praetoria*, (3) *pacta legitima*. All these had the essential quality of contract without the name. (1) Included pacts made as part of a principal contract; we shall come on examples under the Law of Sale. (2) Included two examples with definite names; *constitutum* was a promise to pay by a fixed date a debt already due from the promiser or another person; *hypotheca* has been already noticed. (3) *Pacta legitima* were two forms which Emperors made actionable: *pactum de constituenda dote*, an informal agreement for *dos*, was made valid by Theodosius; *pactum donationis*, a promise to give, we have already seen was made binding by Justinian. The three which alone enjoyed the name of contracts were: (1) Sale (*Emptio Venditio*), (2) Letting on hire (*Locatio Conductio*), and (3) Partnership (*Societas*). All these were bilateral, and their actions *bonae fidei*. It should be remarked that all three could in the alternative be constituted

by stipulation, and that sale was, in fact, sometimes so made: the remedy of either party would then be by a *stricti juris* action. Also the *promissor* in sale by stipulation impliedly warranted a good title to ownership of the thing sold (*praestare auctoritatem*), whereas an ordinary seller had only to ensure legal possession to the buyer.

(1) Sale. This requires three elements: (*a*) Seller and Buyer, (*b*) Thing sold, (*c*) Money price (*pretium*). (*a*) The seller, whether or not legal owner, must be able to give legal possession. (*b*) The thing may be ascertained or unascertained, present or future. If unascertained, this was *emptio generis*; the buyer might select or leave the seller to do so. If the thing were future, *e.g.* "next year's crop," this might be "so much to be paid for the chance of a crop" (*spei emptio*), or "so much for every bushel gathered," provided some were gathered (*rei speratae emptio*). (*c*) The price must be arranged in money; otherwise the agreement before delivery would be unenforceable exchange. The Sabinians had wrongly regarded exchange as a species of sale. The price fixed need not be adequate, but if less than half the real value, this was *laesio enormis*, and gave the seller an optional right of rescinding. The moment of *dies cedit* was at the fixing of the price by the parties or by a named valuer. Justinian made two changes. (i) If it had been agreed to have the terms in writing, whether informal or formally drawn up by a notary (*tabularius*), there was no vested right of contract till this writing was completed as arranged. (ii) Earnest (*arra*) had already been used, sometimes merely as evidence of a bargain, sometimes as a deposit by way of part-

payment: it now became a means of rescinding; for the buyer by forfeit of the earnest, for the seller by paying back the double of it.

The seller's duties were four: (*a*) diligent care, (*b*) delivery of possession, (*c*) compensation for eviction, (*d*) warranty against secret faults. As to (*a*), from the moment of *dies cedit* till delivery he must guard the property with the care of a *bonus paterfamilias*. (*b*) The possession he had to deliver must be lawful and undisturbed (*vacua*), apart from any question of ownership. (*c*) He did not warrant against violent dispossession, but if the buyer should be lawfully evicted, two cases were possible: (i) he must pay double value, if so provided, *i.e.* if there was a *pactum adjectum* to that effect made at the time of the sale (*in continenti*), or a stipulation made later; (ii) in the absence of express provision, he must compensate for the actual loss. (*d*) If the buyer afterwards discovered undisclosed faults, he had two alternative remedies. (i) He could rescind the sale by *actio redhibitoria*; or (ii) he could reduce the price by *actio aestimatoria* (also called *quanti minoris*), the rate of reduction being smaller, if the seller had not known of the defect. Our maxim is *Caveat emptor*: the Roman seller might have well exclaimed *Caveat venditor!*

Some common cases of *pacta adjecta* were (i) provision for absolute insurance by the seller against even accidental loss; (ii) for warranting ownership as well as possession; (iii) for seller's right to rescind on non-payment of price by a fixed day (*lex commissoria*, where *lex* means condition); (iv) for seller's right of pre-emption, should the buyer afterwards wish to sell (*pactum protimeseos*).

The duties of the buyer were to accept delivery and pay the price; this having originally been fixed in money, might be now actually paid partly in goods or by way of set-off, if the seller agreed. But the buyer impliedly warranted ownership as well as possession of whatever he delivered as price. If accidental loss occurred before delivery, the loss fell on the buyer, except in three cases: (i) where there was express provision for insurance, (ii) where the goods sold were part of a whole lot, and they had not yet been ascertained by weight or measure, and (iii) where some express condition was still unfulfilled. In the first case by agreement, in the other two by implication of Law, the maxim *Res perit domino* held; otherwise it was excluded from the rules of Sale.

Ownership of things sold passed (*a*) on delivery, if so expressly provided by stipulation or *pactum adjectum*, *e.g.* in sale on credit; (*b*) by implication on payment or security given for it, unless the contrary was provided; (*c*) if there was a "suspensive" condition which hung up the contract, then on fulfilment of this condition. These three cases assume that the seller had himself the ownership of what he was selling. If he had not, then (*d*) the buyer must wait till usucapion ripened his possession into ownership. So many sellers had only Bonitarian or Alien ownership that we can understand the expediency of requiring delivery only of possession.

The buyer's ordinary action for delivery was *actio ex empto;* the seller's for payment was *ex vendito*, but under either name many subsidiary matters could be brought in.

(2) Letting on hire. This included (*a*) ordinary

letting (*Locatio Conductio rerum*), (*b*) letting one's services (*L. C. operarum*), (*c*) delivering a thing for work to be done on it (*L. C. operis faciendi*). We call the first Letting, the second Employment, the third Bailment of various kinds, *e.g.* carriage of goods, sending clothes to be cleaned or mended. It was sometimes a narrow line which divided (*b*) from (*c*). A free woman as laundress in a house was *locatrix*, as letting her services; if she kept a general laundry, she was *conductrix* of the clothes sent to her. The consideration-money in each case was *merces* (less correctly *pretium*): paid by a tenant-farmer (*colonus*), or by a tenant-householder (*inquilinus*), it was also known as *pensio* or *reditus*. In forms (*a*) and (*b*) the *conductor* pays the *locator*, in (*c*) the *locator* pays the *conductor* for work done by him to the property of the *locator*. If no *merces* was fixed, this was not Letting on hire, but *nudum pactum* becoming an innominate contract upon delivery; sometimes it was treated as mandate.

(*a*) The duties of an ordinary lessor were four: (i) to deliver the thing agreed to be let, (ii) in good condition, (iii) to keep it so, (iv) to permit the tenant to carry away his own movables. (i) Delivery must be for a definite term; this rarely exceeded five years: it gave the tenant merely detention, not possession. (ii) It was a breach of duty to let a house dangerously ruinous or pastures poisonous to cattle: if the lessor knew and kept silence, he must compensate; if he did not know, he still lost his right to rent. (iii) The duty of repairing *primâ facie* fell on the landlord. (iv) The tenant could enforce this right by the interdict *de migrando*, but in removing his own fixtures he must not damage the lessor's property.

The primary duties of a hirer were three: (i) to pay rent, (ii) to take care as a *bonus paterfamilias*, (iii) to give up possession at the end of the term. Either the lessor's or the hirer's duties could be modified by stipulation or *pactum adjectum*, *e.g.* as to repairing. The lessor could rescind, if rent was in arrear for two years, or if he had "urgent need" of the thing let. If he sold over the tenant's head, the purchaser could at once evict: the tenant's only remedy was then to sue the lessor for damages by *actio conducti*. But (contrary to the English rule in some cases) the tenant was not liable for rent, if the thing let was destroyed by fire or otherwise, or even if it was rendered unprofitable by unexpected calamity, such as flood, locusts, etc. In place of our English Distress for rent, the lessor had an implied hypothec on furniture and crops. Hypothec on farming stock and implements required express agreement. A hypothec, express or implied, was enforceable against the tenant or a third person by *actio Serviana*. If a *colonus* was not in debt for rent, he had the interdict *quod vi aut clam* for removing crops at his outgoing.

(*b*) This was not of common occurrence: servile work being mostly done by slaves and freedmen, there was little occasion for any special branch of Law on Employers and Workmen. Higher services (*operae liberales*), such as teaching or doctoring, were generally not the subject of actionable agreement: a physician or schoolmaster who could not get in his fees must ask the Praetor in his extraordinary jurisdiction to fix the reasonable amount.

(*c*) The points arising under this head are best seen by examples. If A wished B, a goldsmith, to

make him a ring, either A or B might find the gold. If A did, this was *locatio conductio*, provided they agreed on a fixed sum for the workmanship. If B found the whole or even part of it, this was sale, though the point had earlier been doubted. If clothes were sent to a fuller or tailor for cleaning or mending, and *merces* was fixed beforehand, *actio locati* or *conducti* would lie on either side; if no *merces* was fixed, the remedy of either would be *actio in factum*.

Accidental loss generally fell on the lessor as owner, but a worker by piece-work (*per aversionem*) had to show extra diligence and was liable for any injury to the property, unless it was caused by the *vis major* of a stranger. In carriage by sea, if jettison (*jactus*) became necessary, the loss was divided between the owners of the ship and of the goods, as in our "General Average." Under ordinary letting, on the death of a tenant during the term his heir succeeded to his rights and duties. Under forms (*b*) and (*c*), the contract was strictly personal, and was terminated by the death of either lessor or hirer.

(3) Partnership. *Societas* was Trading Partnership, and varied according as its object was a single transaction, a particular trade, or general trading of all kinds. We will notice only two forms, that for carrying on some one trade (*societas negotii alicujus*) and Revenue partnership formed by tax-collectors (*societas vectigalis*). In all kinds profit and loss were equally shared, unless it were otherwise provided. A "leonine" partnership, which cast all loss on one partner and gave him no share in gains, was void. The duties of a partner were mainly four: (*a*) to

pay up his share of capital, (*b*) to contribute as agreed towards losses, (*c*) to reimburse fellow-partners for any out-of-pocket expenses on firm business, (*d*) to show ordinary care and diligence (*ut in suis rebus*). If A, B, C, were partners, and C purported to transfer his share to D, and A and B consented, this terminated the original partnership; A, B, D, constituted a new one. If A and B did not consent, and none of the three gave notice of dissolving, the old partnership subsisted between A, B, and C, but there was now an additional new partnership solely between C and D, D having no rights against A and B, for *Socius socii mei meus socius non est.* Partnership was dissolved (i) by efflux of the term (if any) for which it had been formed; if there was none, then on notice being given by any partner; (ii) by insolvency, confiscation of goods, or death, of any partner. Also (iii) partnership for a single transaction, *e.g.* for one trading voyage, was dissolved on its completion. Revenue partnership differed from others in two respects, (*a*) it was capable of incorporation under Public Law, (*b*) by express provision the heir of a deceased partner might succeed to his place. During any partnership or at its dissolution any partner could bring an action for account (*actio pro socio*).

If A and B were partners, and B contracted to buy goods from C for the firm, and then had occasion to be absent, A could not, without more, sue or be sued by C. In modern language, B was not regarded as agent for either A or the firm. And no *societas* (except an incorporated Revenue partnership) could sue or be sued. But if B before going away had assigned to A his rights of action (*cessio actionum*),

A by praetorian reform was allowed to sue C. And conversely C could sue A, but in these cases only: (*a*) if A had expressly instructed B to contract (*mandatum*), or (*b*) if he had subsequently ratified B's contract (*mandatum tacitum*), or (*c*) if A or the firm was proved to have gained by the transaction.

D. Agency. The above shows that the Law of Agency was not clearly developed. Mercantile agency involves two elements, (1) the giving of authority by the Principal to the Agent, (2) the direct legal relation (English "privity") thus brought about between the Principal and those with whom his Agent contracts. As to (1) any well-to-do Roman had wide choice. He had slaves, and perhaps sons *in potestate*, to represent him; he could hire factors, brokers, and other experts, by *locatio conductio* to act for him; and he could perhaps find a competent friend to be, under contract of mandate, his unpaid agent. But though a slave could stipulate in the name of and for the benefit of his master, he could not be *promissor*. And if what he stipulated for was license to do a personal act, *e.g.* leave to use a neighbour's private footpath, though this slave could go over it on his master's business, neither the master nor any fellow-slave could. Again, as to element (2), the Roman had to be cautious; praetorian reform had made it easier for him to be sued than to sue.

Mandate in its full and only proper sense was the commissioning of an Agent (*mandatarius*) to conduct for his Principal (*mandans* or *mandator*) some business transaction (*negotium*) with a third person or persons. This contract cannot fairly be classed with any of the previous ones. It was not a Real contract, as it did

not rest on or necessarily require delivery or the like. The Romans called it a Consensual contract, but it totally differed from the three others so called, because it was (1) directly unilateral, and (2) not enforceable immediately on interchange of consent. Introducing a strong fiduciary relation between the parties, it resembled *fideicommissum*. Mandate (*a*) was gratuitous in form, (*b*) imposed on the unpaid agent the diligence of a *bonus paterfamilias*, and (*c*) imposed infamy, if without valid excuse the agent failed to perform his part well.

The Institutes make a five-fold division of mandates. (1) For the benefit of the Principal only (*suâ tantum gratia*); this was the simple and normal type. (2) For Principal and Agent (*suâ et tuâ*); (3) for a third person only (*aliená tantum*); (4) for Principal and third person (*suâ et aliená*); (5) for Agent and third person (*tuâ et aliená*). These will be best understood by examples. (1) A commissions B to buy him a horse at an auction. (2) A commissions B to lend at interest to C who is building for A and wants ready money: here A, as *mandans*, gets benefit by hastening the progress of the building, and B, *mandatarius*, by receiving interest. (3) A commissions B to buy for C; the validity of this had been doubted but was finally admitted. (4) A commissions B to buy for A and C jointly; this was always certainly valid. (5) A commissions B to lend at interest to C; this was a kind of guarantee by A of C's solvency (*mandatum qualificatum*). If A professed to commission B for B's sole benefit, *e.g.* to buy a particular piece of land for B himself to build on, this (*tuâ tantum*) was not true mandate but advice. Yet if A agreed by stipulation or

contemporaneous pact to indemnify B and the advice turned out badly, B was allowed to bring *actio mandati contraria*, just as if there had been a real mandate.

An intending *mandatarius* could change his mind and draw back after agreeing to act, until the moment for acting was so near that no time was left for the Principal to find another Agent: up to this somewhat vague date the contract was not binding. The Agent's duties were five: (1) to show, as we saw, the utmost diligence; (2) to act in person, for *Delegatus non potest delegare*, unless he were expressly authorized to appoint a sub-agent; (3) to restore any property delivered to him and all profits of the business; (4) to account to his Principal; and (5) to cede to him all rights of action against persons with whom he had dealt as Agent. If the Agent exceeded the authorized outlay, the Sabinians had held that he lost all right to reimbursement: Justinian decided that he must still be recouped up to the amount fixed. The Principal had *actio mandati* (*directa*) for breach of duty by the Agent or disputed accounts. The Agent had *actio mandati contraria* to recover proper out-of-pocket expenses. Where in cases of *operae* or *opus faciendum* no remuneration had been fixed, the person employed was allowed to use this *actio contraria* (instead of *actio in factum*) for recovering any actual expense to which he had been put.

There was often an understanding that the nominally unpaid *mandatarius* should receive a fee (*honorarium* or *salarium*) not recoverable by action. Such payment had rested purely on honour, till Severus referred it to the *extraordinaria cognitio* of the Praetor to settle how much would be fair.

Mandate being a highly personal relation was generally extinguished by the death of either party. But (1) if the Agent did not know of his Principal's death, his transactions were protected by his *bona fides*; (2) Mandate might be specially constructed so as to be continuous, after the Principal's death, between his heir and the Agent.

The Principal, we have seen, could sue third persons, only if the Agent had made *cessio actionum* to him. Conversely the Praetor had allowed third persons to sue the Principal in several cases. Three of these were concerned with the *peculium* of a son or a slave. (1) *Quod jussu* was the action where a father or master had directed, or had subsequently ratified, the dealings of a son or slave; (2) *tributoria* was where he had known of them; (3) *de peculio et in rem verso* where he had profited by them, whether or not he had known at the time. In the first and second he was liable, if necessary, to the extent of the whole *peculium*: in the third for so much of it only as was invested in business (*merx peculiaris*).

The Agent in these three cases was in the *potestas* of the Principal. Two other actions lay, where the Agent might either be *in potestate* or even *sui juris*. (*a*) *Actio exercitoria* was against a shipowner (*exercitor*) on contracts made by his ship captain (*magister*). (*b*) *Actio institoria* lay against a shopowner on contracts of his shopmanager (*institor*). It made no difference whether the *magister* or *institor* was son, slave, freedman, or freeman stranger employed by the Principal. But a father's responsibility for debts of his son was somewhat lessened by *Senatusconsultum Macedonianum*, which made all loans to a son *in potestate* illegal,

unless his father consented, or the lender had good reason for supposing that the son was *sui juris*. These five actions with some minor ones are called by the old commentators *actiones adventitiae*. They were particular steps towards a general Law of Agency which the Romans never realized in full, that a contract made by an Agent in the scope of his employment is just as if it had been made by the Principal, embodied for us in the maxim *Qui facit per alium facit per se*.

The classification of contracts in Justinian's Institutes cannot be called satisfactory. It makes ten in all: four Real, one Verbal, one Literal, and four Consensual. Real were placed first, because of the fanciful idea that Delivery was taught by the Law of Nature. Verbal and Literal were by this date inextricably mixed up: *expensilatio* was obsolete, and *cautio* was not in theory a contract but evidence of a supposed preceding stipulation. Mandate was unnaturally grouped with three perfectly dissimilar contracts. We have endeavoured to follow the historical order of development. Formal contracts, all unilateral, were the oldest. Executed contracts, directly unilateral but sometimes indirectly bilateral, came second. Executory contracts were the last and highest development, and with them should be joined the *pacta vestita*, true contracts in all but name. Last of all we place Mandate and kindred obligations connected with Agency, Mandate being preliminary to the making of contracts by an Agent, and the *obligationes adventitiae* arising out of the contracts he made.

E. Natural Obligation, as contrasted with Legal, had a wide and a narrow sense. The wider meaning included *nuda pacta*, which supported a defence

(*exceptio*), but not an action. The narrower and usual meaning referred to agreements between a family-head and those under his *potestas*. As neither could sue the other, these were not primarily available for either a plaintiff or a defendant. Still they had some legal effects, mainly four. (1) Money paid under such an agreement could not be reclaimed. (2) Natural obligation could be set off against legal claim. (3) Accessary contracts, such as guarantee, could be based on it. (4) Money due under it might increase or lessen the value of a *peculium*. While the only parties concerned were connected by *potestas*, these effects were dormant. But if the son was emancipated or the slave manumitted, or if some person *sui juris* was also a party, the effects became operative. For example, under (3), A's slave B managing A's shop suggests enlargement of the business and premises. A fears the risk, but B finds a freeman capitalist willing to guarantee against loss for the first three years. This secondary contract of guarantee rests on the primary Natural agreement between A and his slave B.

F. Correality is where there are *co-rei*, *i.e.* two or more creditors, debtors, or both. Correality proper is where, by express or implied agreement, the release of one debtor leaves the others liable. Solidarity is where the release of one is to release all. Guarantee is where one is primarily liable, and another becomes so only on his default. Guarantee could be made in three ways: (1) by stipulation, (2) by *Mandatum qualificatum*, or (3) by *constitutum* (more fully *pactum constitutae pecuniae*). (1) Stipulation by way of guarantee was called *Fidejussio*. It had long superseded *sponsio* and *fidepromissio*: both these had two

defects; (*a*) they could be joined only to stipulations, and (*b*) they did not bind the heirs of sureties. A *fidejussor* could bind himself for the whole or part of a debt, or one might make himself liable for the whole, and a second for part only. The surety was freed (*a*) if the principal debt became larger or more onerous, (*b*) if the Principal debtor became unable to pay by his own gross fault and not by misfortune: thus it appears that he guaranteed the solvency of his Principal, but not his honesty. A *fidejussor* had in all three "benefits." (i) *Beneficium cedendarum actionum:* he need not pay up until the creditor assigned to him all rights of action against the debtor and any co-sureties. (ii) From the time of Hadrian, *beneficium divisionis:* all solvent sureties must be sued together, each for his own share. (iii) By the Novels was added *beneficium ordinis* (also called *excussionis* or *discussionis*): the principal debtor must be sued before any surety was called on. *Fidejussio* could be created before, at the time of, or after, the principal contract. No technical word was necessary, but probably the old term *fidejubesne?* was still often used.

(2) In *mandatum qualificatum* the surety was *mandans*, the creditor *mandatarius;* thus it fell under form (5) of mandate, *tuâ et alienâ*. It differed from *fidejussio* in three respects: (*a*) it must precede the main contract, its object being to bring that about; (*b*) the surety for a projected loan could withdraw till it was just about to be advanced; (*c*) he was freed by the creditor abandoning any of his remedies against the principal debtor. It is curious to observe under (*b*) that it was here the *mandans* (not the *mandatarius*) who had a *locus poenitentiae* up to the last moment.

(3) *Constitutum* was, as we saw, a *pactum vestitum*. It could be used as a form of guarantee only when a debtor was either already being sued, or was threatened with an action. Then another person undertook to pay his debt, if necessary, in consideration of the creditor abandoning the action begun or threatened. *Constitutum* then was necessarily subsequent to the principal contract. An accessary contract purporting to be *fidejussio* but technically invalid as such could never be upheld as *constitutum*.

G. Miscellaneous Points. 1. Void Contracts. Contract was avoided by (*a*) essential mistake, (*b*) illegality, immorality, or impossibility of object, or (*c*) disability of a party. If induced by violence (*vis*) or threats (*metus*) on the part of any one, or by the fraud (*dolus*) of the other party, it was voidable at the option of the innocent party. (*a*) A mistake is essential (*in corpore*), if it goes to the root of the contract: it is non-essential (*in substantiâ* or *materiâ*), if it is in some lesser matter. If A bought a bronze vase, because he mistook it for gold, the contract was void. If it was only of lower quality than he imagined, he must keep to his bargain; only, if the price was more than double the fair value (*laesio enormis*), he could claim a reduction. Valuable consideration was not essential to stipulation, but if the promise was induced by a consideration which did not exist, or afterwards failed (*causâ datâ, causâ non secutâ*), the *promissor* was released. Under mistake, too, falls the case where question and answer do not agree, *e.g.* A stipulated for a hundred *aurei*, and B answered by promising fifty. After some doubt it was settled that here was no contract at all. (*b*) Some of the old examples of impossibility would not be so now,

e.g. a promise made at Rome to pay the same day at Carthage could be carried out, if there was a telegraph. Sale of a *res non commercii* was impossible, yet the buyer was allowed to sue *ex empto* for return of the purchase money; if the seller had knowingly deceived him, he would recover damages also. Sale by stipulation in such a case would be a complete nullity. (*c*) The contract of a lunatic was void: agreement between a family-head and one in his *potestas* was, we have seen, natural obligation but not contract; so too was probably a promise made by a pupil without his tutor's authority.

2. Conditions. These often related to the time or place of performance. If no place was named, the Law implied one. This in stipulation or other *stricti juris* contracts was the *promissor's* place of domicile: in sale or other *bonae fidei* contracts was the place where the subject-matter was. Reasonable time was always implied. Such a contract as the stipulation "Do you engage to pay to-day, if your ship arrives to-morrow?" was *stipulatio praepostera*. This was held void until Justinian ruled that it was binding at once, but not enforceable until the condition was fulfilled. Pacts contemporaneous with the main contract (*in continenti*) were generally assumed to be essential conditions, and as such enforceable by action. Subsequent pacts (*ex intervallo*) supported an action only when they followed after a *bonae fidei* contract, and materially varied it: otherwise they were *nuda pacta* supporting only an *exceptio*. According to the way a condition is expressed, it may be either "suspensive" or "resolutory." If suspensive, there was no binding contract, until the condition was fulfilled; *e.g.* "I agree to sell this horse

for so much, provided you pay by ten days from now." If resolutory, there was an immediate contract, but the seller had an option of rescinding it on breach of the condition; *e.g.* "I sell you this horse, but in ten days, if you have not paid me, I am to be at liberty to annul the sale." Either of these is an example of *lex commissoria:* the second form was commoner. A engages by stipulation to pay B an annuity "as long as B shall live." B dies, and his heir sues A for continued payment. As the action is *stricti juris*, B's heir wins it, unless A expressly pleads *exceptio doli* or *conventi*. Had the annuity been by legacy, the action would have been *bonae fidei*, and A would win without any necessity of pleading the *exceptio*.

3. Fraud and Negligence. Fraud (*dolus*, more fully *dolus malus*) is intentional misrepresentation causing damage. Negligence (*culpa*) is strictly unintentional. But gross negligence (*culpa lata*, or *non intelligere quad omnes intelligunt*) was counted as fraud. *Culpa* admitted of three other degrees. (*a*) Trifling negligence (*culpa minima*, or *negligentia*) was always excusable. (*b*) Slight negligence (*culpa levis*) was want of the higher degree of diligence, that of *bonus paterfamilias*. (*c*) Ordinary negligence (*culpa* alone) was failure in the lower degree of diligence (*ut in rebus suis*). The general rule was this. If the contract benefited both parties, each had to show the lower diligence, that is to be free from ordinary *culpa*. If it was for the benefit of one side only, the party benefited must show the higher diligence, free from even *culpa levis*. But there were exceptions. We have seen that a mortgagee who took only half the benefit, and even a *mandatarius*, who might derive no

benefit at all, were responsible for the higher diligence and liable for *culpa levis*.

4. Time and Interest. The naming of a time for performance did not of itself make this time essential; it only showed that earlier performance could not be exacted. Even after the day was past there must be a demand (*interpellatio*) before an action could be brought. But if the time was clearly intended as of the essence of the contract, and the day named was past, then and then only no demand was necessary (*dies interpellat pro homine*). The party to a contract who had delayed over long was said to be *in morâ*. *Mora* was a species of *culpa*, *levis* or not according to circumstances, for which the other party could recover damages and interest. Apart from *mora*, any agreement for payment of interest, *e.g.* on a loan, required a distinct and express agreement. If the main contract was *stricti juris*, as a loan arranged by stipulation or by *mutuum*, this agreement must be by a separate stipulation: in *bonae fidei* contracts a contemporaneous pact sufficed. The Twelve Tables had fixed the rate of interest at one per cent. a month (*centesimae usurae*). This was cut down by Justinian to six per cent. per annum. But higher rates were allowed on loans for buying and lading goods, under the name *foenus maritimum*. Compound interest (*anatocismus*) was illegal by old Law reaffirmed by Justinian.

5. Assignment (*cassio nominum*). If A was under a contract creditor of B, he had a *res incorporalis* consisting of his claim which he could assign to C by *pactum conventi*. This would not affect B, until he had notice of it. Any such assignment or transfer

of rights was "subject to equities," as we say, *i.e.* liable to any previous claims outstanding against B. C would, therefore, probably not pay full value for it. Anastatius enacted that under certain circumstances C should not be able to recover from B more than he had actually paid to A. We have nowadays "transferable instruments," intended to pass from hand to hand subject to equities. A Roman *cautio* could perhaps be constructed to pass in this way. We have also "negotiable instruments" which pass free from equities, such as cheques and banknotes. The Romans had nothing corresponding to these.

6. Dissolution of contract. The most important form of dissolution was Novation, the making of a new contract with the intention of superseding the old one. Unless this intention was clearly expressed, Justinian ruled that the second contract must be deemed an addition to the first, not a substitute for it. The new contract was often a specially framed stipulation (*acceptilatio*). If the original contract now intended to be dissolved was not a verbal one, the parties employed the "Aquilian stipulation." This was an elaborate form, which first turned all claims of every kind into a single stipulation, and then made the creditor acknowledge the (nominal) receipt of his due. Thus it was novation followed by a release. If through some flaw it was technically invalid as a stipulation, it still held good as an agreement not to sue (*pactum de non petendo*), which could be pleaded as a defence. But any new and material term in a second contract, along with expression of intention, sufficed for novation; particularly common was the insertion of a new debtor:

if the old debtor was party to this arrangement, it was called *delegatio;* if he was not, it was *expromissio.* In two cases a contract was, by operation of Law, dissolved by Merger (*confusio*): (*a*) if the sole creditor became heir to the sole debtor, or the debtor to the creditor, provided no inventory was made, as this would have kept the contract alive; (*b*) if the creditor had recovered judgment, when the contract was merged in the judgment. There was virtual dissolution, if the defendant could plead (*a*) prescription of thirty years, (*b*) capitis deminutio (*maxima* or *media*), (*c*) full set-off (*compensatio*), or compromise (*transactio*). Apart from dissolution, there might be diminution of the creditor's contractual claim, when the debtor was (*a*) a partner sued in action for account, or (*b*) an insolvent who was voluntarily surrendering his property. Either of these could, if necessary, keep back enough for bare sustenance (*beneficium competentiae*).

III. QUASI-CONTRACT. *Obligatio quasi ex contractu* differs from contract, because it rests not on consent but on circumstances which raise some analogy with true contract. The chief kinds were: (1) Payment by mistake (*Solutio indebiti*), and (2) Unauthorized agency (*Negotiorum gestio*). (1) If A paid money to B, thinking it was due to him, when it was not, the position was much as if A had lent the money to B, and could reclaim it. That is to say, the *solutio indebiti* was analogous to *mutuum.* A could generally bring *condictio certi* for recovery of the money. But in three cases he could not: (*a*) if B was a pupil; (*b*) if the mistake was of Law, not of fact; (*c*) if the sum paid was a *lis crescens.* (*a*) This case had been doubtful: Justinian ruled against recovery. (*b*) Women

and other privileged persons might of course be relieved in the Praetor's discretion. (*c*) A *lis crescens* was a debt such that false denial of liability doubled it. The chief examples were payment of *depositum miserabile*, and of a charitable legacy.

(2) If A is away, and his neighbour B sees imminent risk to A's property, *e.g.* an outlying crop threatened by rain, a roof blown off, etc., and undertakes the necessary business, B is *negotiorum gestor*. He acts as if he had a mandate from A. (*a*) A on hearing of this ratifies B's act. But suppose B managed badly and inflicted needless damage. He was responsible for the higher diligence, liable for even *culpa levis*. A could bring against him the *actio negotiorum gestorum* (*directa*). B could bring a counter action (*negotiorum gestorum contraria*) to recoup himself for expenditure, so far as it had been beneficial. (*b*) If A has not ratified, it is a question on the merits whether he ought to have done so. If he ought, the action and counter action both lie.

Other examples were the relations between pupil and tutor, adolescent and curator, co-heirs, and co-legatees. The first and second are again analogous to mandate arising by operation of Law. The third and fourth are analogous to partnership.

CHAPTER VII

A. DELICT

DELICTAL Obligation arises out of wrongdoing (*delictum*, English "tort"): it may or may not be also a case for criminal prosecution. There were only four recognized delicts; two of these were very ancient, Theft (*furtum*) and Outrage (*injuria*); the other two, Robbery (*rapina*) and Damage (*damnum*), were established later. Wrongful intention (*dolus*) was essential in all except *damnum*. But while in the Law of Contract *dolus* always meant fraud, in Delict this word covers any intention of doing an unlawful act.

I. Theft. *Furtum* was fraudulent handling or dealing with the movable of another, its use, or the possession of it. The wrongful intention (*animus furandi*) must be shown by an outward act done against the owner's will (*invito domino*). A thief caught redhanded, on the spot or on his way to stow the stolen goods elsewhere, was *fur manifestus*: he was liable to fourfold damages. If caught later, he was *fur nec manifestus*, liable to pay twofold damages. If A had lawful possession or detention of something belonging to B, and appropriated it, this was theft (English "larceny by a bailee"). If A borrowed B's

horse avowedly for country rides, and took it into battle as a charger *invito domino*, this was theft. If A pledged a vase to B, and then secretly took it from B's shop or house, though A was *dominus*, yet B was *dominus pro tempore*, and there was a theft by A. If A frightened or excited B's cattle in order to help C to steal them, and two or more were in fact stolen, both A and C could be sued for the aggravated form of cattle-stealing called *abigeatus*. If A, a slave of B, stole from his master, B of course could not sue A. Still there was theft producing two legal effects. (1) B could sue any freeman accomplice of A. (2) The thing taken became *res furtiva* and incapable of usucapion. An infant could be sued for theft only if he was old enough to be considered *doli capax*. A, slave of B, is asked by C to steal from B. A tells his master, and by B's direction hands something to C, to the end that C may be caught *flagrante delicto*. Justinian ruled that C could be sued by *actio furti* or *servi corrupti*, although in fact there had been no complete theft and no successful corruption of the slave.

The plaintiff must be some one directly interested in the safety of the thing, *e.g.* either the mortgagor or the mortgagee could sue; so could a buyer, even before the ownership had passed to him. A steals clothes of B from C, a fuller or a tailor: *primâ facie* B can sue only by *actio locati* against C, who in turn can sue by *actio furti* against A; but if C is insolvent, B can himself bring *actio furti* against A. If A steals from B a thing lent to him by C, Justinian gave C as owner the option of *actio commodati* against B or *actio furti* against A: before his time it had turned

(as above) on the solvency of B. If C began an *actio commodati*, and then discovered the thief A, he was allowed, if he liked, to discontinue his action against B, and proceed by *actio furti* against A. The *actio furti* was a civil action purely for recovery of the fourfold or twofold penalty. To recover the thing itself, a distinct action was necessary; for this the owner had a choice of real action (*vindicatio*), or *actio ad exhibendum* for production of the thing, or personal action (*condictio*). This last was on principle inappropriate, as in it the plaintiff did not describe the property as his own, but it was allowed *in odio furum*. The Law of Theft had many points in common with English Law, but with one fundamental difference; in Private Law, theft was treated purely as a civil wrong. Under the later Empire any thief could also, by Public Law, be criminally prosecuted.

II. Robbery. *Rapina*, erected into a distinct delict late in the Republic, was theft with violence. The robber was *improbus fur*, and *actio furti* would in general lie against him alternatively with *actio vi bonorum raptorum*. Either action might be the more advantageous: *actio furti* was better against a manifest thief, as by the other the plaintiff suing within the year recovered only the value *plus* a threefold penalty; if he sued later, then the value and as much more for penalty. On the other hand, a person who could not bring *actio furti* for want of pecuniary interest could bring *actio vi bonorum raptorum*, if he had been forcibly despoiled, *e.g.* a *depositarius*. Neither *furtum* nor *rapina* applied to wrongful taking of land. If A, believing himself to be owner of a plot of land occupied by B, forcibly dispossessed him, B had a remedy

under a constitution of Valentinian. Under this, if A was really owner, he lost his ownership: if not true owner, he must restore the land to B, and also pay him its value as a penalty. Robbery proper was of course always a crime, even before it became a distinct delict.

III. Damage. *Damnum* (more fully *damnum injuria*) was injury done to property by intention (*dolus*) or negligence (*culpa*) so as to lessen its value. The *actio damni injuriae* was created by a *Lex Aquilia*. The first section fixed the penalty for killing a slave or cattle of another at the highest value the property had ever reached in the preceding year. The second section was obsolete. The third fixed the penalty for all other damage to property at its highest value within the preceding thirty days. Thus all damage short of killing, and all killing of animals other than "cattle" (in its broadest meaning) came under this third section. The damage might be direct or consequential: it would be very expensive to kill a slave who was instituted heir to a rich inheritance. It was *culpa* for a soldier to kill with a javelin in a place frequented by the public, or for any one without giving warning to throw a lopped branch over a wall on to the head of a passer-by. And a driver might be liable for incompetence, even though he had done his best to check his runaway steed. It was not *dolus* to kill *se defendendo*, *i.e.* in defence of person or property, though it was "better," if possible, to arrest the wrong-doer.

In connection with damage there were three forms of action, *directa*, *utilis*, and *in factum*. The first was the regular civil action under the Aquilian Law. The

other two were praetorian. For the first to lie, the damage must directly ensue from a bodily act done to the material substance of the property (*corpore corpori*), *e.g.* if A burns B's oats or throws them into the Tiber. But if A gave them to C's horse to eat, the effect on the oats was the same as if B's horse had eaten them; there was damage *corpore*, by A's act, but not *corpori*. If A persuaded B's slave to climb a rotten branch, and he fell and broke his leg, this was *corpori*, but not *corpore*. And if A took the chains off B's slave, and he then ran away, this was neither *corpore* nor *corpori*. The general rule was that damage *corpori* but not *corpore* supported *actio utilis*: if *nec corpore nec corpori* (as in the case of the runaway slave), there was *actio in factum*; similarly this action was safer to bring where the damage was *corpore* but not *corpori*, as in the second case of the oats above.

IV. Outrage. *Injuria* as a delict proper was personal affront to the *existimatio* of a citizen. It might consist in injury to his person, family, reputation, or honour. This required *dolus*. It corresponded to various English torts, as assault, libel, slander, etc. It was *injuria* to strike a man, to raise a crowd to mob him, to make scurrilous verses about him, to take unjustified bankruptcy proceedings against him, or other proceedings reflecting on his honour. If A thrashed B's slave, it was a question of intention to be gathered from evidence, whether this was *damnum* to B's property or *injuria* by way of showing A's contempt for B, as the slave's master. And if the slave was held in usufruct, it was again a question of evidence whether the *injuria* was aimed at the *dominus* or at the *fructuarius*; *primâ facie* it would be the *dominus*. If

the affront was to A, wife of B, who was son of C and in his *potestas*, either A, B, or C, could sue in the alternative. The remedy for *injuria* was the old Civil Law *actio injuriarum*, as modified by praetorian law.

Aggravated outrage (*injuria atrox*) depended on the kind of injury, the place where, or the person to whom it was offered, *e.g.* putting out an eye, insult in public, or to a man of rank. The Praetor then fixed the exact amount for the Judge to award on proof of the facts. In ordinary *injuria* he fixed the maximum, and the Judge might award less. If the injured person did not sue within a year, he was held to have condoned the insult. But for a few insults, such as violent entry into a house, there was a civil action under a *Lex Cornelia*, which could be brought after long lapse of time (*actio perpetua*). Under this *Lex Cornelia* any *injuria* could also be criminally prosecuted. If the prosecutor had the rank of *patricius*, *consularis*, or *illustris*, he could (contrary to general criminal practice) appear by attorney (*procurator*). Interference with the property of another may occasionally increase its market value, *e.g.* castrating a slave or animal, cropping the ears or tail of a dog. This could not be *damnum*, but the *actio injuriarum* would lie for such contempt of the owner's wishes.

B. QUASI-DELICT.

When the Praetor decided to remedy a wrong which was not breach of contract or quasi-contract, and did not fall under one of the four heads of recognized delict, he or the *Prudentes* said there was an obligation *quasi ex delicto*. There is a real difference

of principle between contract and quasi-contract, the difference between mutual consent and extraneous circumstances: there was none between delict and quasi-delict. All the examples of quasi-delict in the Institutes might have been brought under *damnum*, if the Praetor had felt himself strong enough to expand the meaning of that word. Four out of the five examples, all except the first, are cases of vicarious responsibility. (1) Where a Judge or Magistrate by *dolus* or *culpa* gave an illegal decision, he became personally liable for the injury it did (*Judicem litem suam facere*). It differed from *damnum* only by being an injury to the party's incorporeal right, not to his body. But it was a sufficient defence for the Judge, if he had acted on the opinion of a jurisconsult or jurist, at least so far as the *Lex Citationis* permitted. (2) If A occupied a house, and something thrown or dropped from it (presumably by some child or slave) damaged B while passing by or B's property, A was vicariously liable. (3) If A was master of a ship, he was similarly liable for loss or damage affecting B, a passenger. (4) So too if A was an innkeeper, or (5) a livery stable keeper, B being his guest or stabling a horse with him. If A was *in potestate*, he was primarily liable, but if his *peculium* was insufficient, his father would be liable also. If A, knowingly or not, allowed anything dangerously to hang from his house, here was at once *damnum infectum*, and A was liable to a fixed praetorian penalty of ten *aurei*: if the thing actually fell and killed a freeman B, the penalty was fifty *aurei*; for any lesser injury to B, he could recover double the cost of medical attendance and any consequent loss of earnings. If A's slave was discovered to be the actual

offender, he was called *noxa*, and the resulting action noxal. A could escape liability by surrendering the *noxa* to B. It was Justinian who first prohibited noxal surrender of a son under similar circumstances. If the actual culprit was A's hired free servant, B had the option of suing A for quasi-delict or the hired man for delict proper. *Pauperies* was damage done by an animal, which could not have *dolus* or *culpa* imputed to it: this action also was noxal. If a wild beast escaped from confinement or was brought on to a public road, and did damage, there were penalties imposed by the Law of the Aediles. In case of a partly tamed bear or other naturally wild animal, there was a choice between the aedilitian action and the *actio de pauperie*.

All cases of damage to person or property resulting from fraud, force, or threats, not in relation to any contract, might be regarded as quasi-delicts under the cognizance of the Praetor. The Roman system has been much criticized for co-ordinating contractual obligation, arising out of a right, with delictal obligation, arising out of a wrong. The jurists would probably have replied that both alike came before the Court as breaches of some right, and that in both cases the obligation was measured by the amount of pecuniary damages recoverable.

CHAPTER VIII

PROCEDURE

We now arrive at the last of the three capital divisions of Private Law, *Jus Actionum*. Many points connected with right of action have necessarily been already noticed. Procedure prescribes the forms and details of action proper and other legal remedies. Even in a brief outline it is necessary to sketch its development before the time of Justinian.

There were three periods, which may be described as the system of "Legal Actions," the Formulary System, and Libellary Process. The first lasted nearly till the Second Punic War. The second from then till Diocletian. The third was in force under Justinian. But even in his time there were some remains of the first system, while the second, though nominally superseded, continued to influence the whole course of actions and is often referred to in the Institutes as if it were still in full operation. Under the first system there were five so-called *Legis Actiones*. The two most important were *Sacramentum* and *Condictio*, the Real and Personal actions of their time. In *sacramentum* the thing in dispute or a piece of it was brought into Court, the two claimants began a mock fight over it, the Praetor interfered and settled a

sum of money as a wager. Originally this sum was actually deposited in a temple; hence the name *sacramentum*, the "sacred wager." Then a *Judex* was chosen to examine the facts on which rested the question "Which party wins the wager?" *Condictio* got its name from the technical word *condicere* used of the thirty days' notice to appear before the Praetor for the appointment of a Judge. The name, as we have seen, survived till the latest times as the expression for a personal action. The only other Court Action was *Judicis postulatio:* the two remaining ones, *Manus injectio* and *Pignoris capio* were forms of self-redress, something like our power of Distress. The *Lex Aebutia* abolished the whole system, except in the Centumviral Court, where it lasted throughout. This Court had concurrent jurisdiction, even in late times, with the Praetor's Court, especially in questions of inheritance.

The Formulary System was gradually developed by the Praetor and *Prudentes*. Under it the plaintiff summoned the defendant to a preliminary verbal discussion before the Praetor. At this the plaintiff named the particular *formula* on which he elected to rely. This was the *postulatio*, a formal demand for some particular form of action. Once chosen, it limited the plaintiff to one particular presentment of his case. The defendant then put in any *exceptio* which he considered suitable. Then a single written pleading was composed by way of instruction to the Judge, defining briefly the cases of plaintiff and defendant respectively. If the matter was simple, and the facts little or not at all disputed, the Praetor might himself give judgment, without any written

formula or reference to a Judge. But generally an action had to go through the two Courts, the *Jus* and the *Judicium*. In the main the *Judex* was a judge of facts, but over the hearing of evidence and arguments points of Law also would turn up. Being a simple layman chosen out of a roll (*album*), he had points of resemblance with our juryman, arbitrator, and official referee. Both he and the Praetor had to rely for their law on the help of *prudentes*.

The *formula* had, or might have, four parts. (1) The *Demonstratio* was a preamble beginning with "Whereas" (*quod*) and alleging facts in a general way. (2) The *Intentio* was the pivot of the whole: it alleged either the plaintiff's legal right (*formula in jus concepta*) or the facts from which it was to be inferred (*in factum concepta*). (3) The *Adjudicatio* occurred only in "Mixed" actions, of which more hereafter. (4) The *Condemnatio* was nothing but a formal conclusion giving the Judge authority to condemn or acquit. On the *formula*, when finally shaped, the parties joined issue (*litis contestatio*): this was for most purposes the beginning of the action proper: this is tantamount to saying that under the Formulary system *actio* was a proceeding before a *judex*.

There is a cross-division of *formulae*, (1) according to the object aimed at, (2) according to the frame of the *intentio*. (1) A *formula* might be *in rem*, for recovery of the thing itself, as in *vindicatio*, or *in personam*, as in *condictio*, asking for payment of a definite or indefinite sum of money. This division then corresponds to the difference between real and personal actions. (2) The more important division was (as above) into the *formula* resting on points of

law (*in jus concepta*) and that resting on questions of fact (*in factum concepta*). We will take from Gaius his simple examples of each.

(*a*) "Let there be a Judge. Whereas Aulus Agerius deposited with Numerius Negidius a silver table, the subject of this action; whatever on that account N. N. ought in equity (*ex fide bonâ*) to convey or do to or for A. A., let the Judge condemn N. N. in favour of A. A. accordingly, unless he returns it. If the case is not proved, let him acquit." Here there is a *demonstratio* ("Whereas . . . action"), an *intentio* ("whatever . . . A. A."), and a *condemnatio* in the remaining words. The *actio depositi* not being a mixed action, there is no *adjudicatio*. The words *ex fide bonâ* show that the action is *bonae fidei*, not *stricti juris*.

(*b*) "Let there be a Judge. If it appears that A. A. deposited a silver table with N. N., which by fraud of N. N. has not been returned to A. A., let the Judge condemn N. N. for so much as is its value in favour of A. A. If the case is not proved, let him acquit." Here is no *demonstratio*: the alleged but disputed facts are stated in the *intentio*. The claim being for a thing certain and definite, the *intentio* begins "*Si paret*"; if it had been for an unliquidated amount, it would have begun "*Quicquid paret*."

Libellary Process. The Formulary system was found open to two objections. Its excessive technicality led to frequent mistakes in choosing a *formula*, and the double trial, almost universal, was dilatory. Diocletian abolished the Judge's Court, as a distinct institution. Theodosius did away with the *postulatio*. The art of pleading now became very much what it is in our Courts. To bring the defendant before the

Court, a Court official, at the plaintiff's request, issued a summons and gave notice to the defendant (*denuntiatio litis*). Then followed the Statement of Claim (*libellus*), and a discussion of law and fact before the Praetor or some other magistrate, who was supposed himself to decide the case. But as far as we can judge, the change was not as complete as it professed to be. The Institutes show that the old names of actions survived, just as they had been under the Formulary system. Moreover, the frequent references to a Judge seem to show that something closely resembling the method of double trial was still in use. The Praetor and other higher magistrates were probably not numerous enough to try out every long complicated case that came up in the huge capital of the civilized world. If they sent down issues of fact to be tried by a deputy, he would naturally be known by the old familiar name of *Judex*.

We now turn to matters and distinctions most of which were common to the second and third systems. (1) Classes of action. We will notice five such, (*a*) fictitious, (*b*) preliminary, (*c*) mixed, (*d*) penal, (*e*) discretionary. (*a*) If A had bought land from a non-owner, he had for at least ten years only possession: if he was dispossessed by a wrongdoer, and sued for recovery, the *actio Publiciana* was framed "as if" his usucapio was complete when in fact it was not. (*b*) If a man wished to bring an action, but could not until he had proved that he had sufficient status, the action he would bring to establish his status, *e.g.* to show that he was freeman, or citizen, was preliminary (*actio praeiudicialis*). (*c*) Mixed actions were between joint or adjoining owners: they were so named,

because in their original form each party was in turn plaintiff and defendant, and the *formula* might contain a bundle of *intentiones*. *Actio familiae erciscundae* was for partition between co-heirs, *communi dividundo* between other joint owners; *finium regundorum* was for settling boundaries. (*d*) Penal actions were those in which the plaintiff might recover more than the pecuniary equivalent. Actions on *depositum miserabile* and on charitable legacies we have seen were *in duplum*; *furtum manifestum* supported an action *in quadruplum*. In quite a different sense from (*c*) above, any action for recovery of a thing or its value and also for a penalty was called a "mixed" action. (*e*) A discretionary action (*actio arbitraria*) was where the Praetor or Judge had a discretionary power indirectly to compel specific performance of a duty by fixing a heavy penalty on non-performance, *e.g.* on failure to return an object deposited.

(2) Overclaim (*pluspetitio*). This was where the plaintiff's claim went beyond his right. It might be (*a*) *re*, (*b*) *tempore*, (*c*) *loco*, or (*d*) *causâ* (also called *qualitate*). Examples: (*a*) suing for "Stichus and Pamphilus" instead of "Stichus or Pamphilus"; (*b*) asking for immediate payment of a sum due a year hence; (*c*) claiming performance at Rome, when the defendant had a right to choose Ephesus; (*d*) demanding "Campanian wine," when having a right to "wine" only. The defendant's remedy was generally to counterclaim by *actio in triplum*: if the fault was only *tempore* the interval before *dies venit* was doubled. (3) Set Off (*compensatio*). This was allowed on any account owing from the plaintiff to the defendant, whether it was immediately payable or not.

(4) Security (*cautio*). A defendant always had to give security for appearance (*judicium sisti*), and either party could call on the other to swear *de calumniâ*, *i.e.* that he believed he had good cause of action or of defence. A *procurator* had always to give security *de rato*.

(5) Prescription. All rights of action, real or personal, were in general barred by prescription of thirty years. Some were much sooner: we have seen examples in actions for recovering property from the *fiscus*, for setting aside a *cautio*, and *actio injuriarum*. (6) Lapse of action. If a person having a right of action died before or after he had begun to enforce it, the right passed to his heir, unless it was of a strictly personal nature, *e.g.* arising out of *locatio operarum*, or out of *injuria*. Similarly, if an actual or possible defendant died, the liability descended on his heir, unless the action was penal and the heir had been in no way enriched by the wrongdoing of the deceased, for then *actio personalis moritur cum personâ*. (7) Pendency of judgment. A judgment must be delivered at latest within three years from *litis contestatio*: this was to prevent procrastination of the parties or of the Judge. Under the Formulary system it had been within twelve or eighteen months in different cases. (8) Execution. To enforce judgment, Court officers (*apparitores*) could seize and sell a sufficient amount of the defendant's goods: before Antoninus Pius it had been necessary to go through insolvency proceedings. (9) Appeal. An appeal from a judgment lay to the *Praefectus urbi*, and from him to the Emperor, who generally heard it in the Appellate Council (*auditorium*).

Extraordinary procedure (*extraordinaria cognitio*) has been several times referred to. Thus the Praetor could be invoked without any regular action, and on other than *dies fasti*, to enforce *potestas* against a rebellious son, to carry out *fideicommissa*, or to settle a *honorarium*. After Diocletian the exercise of these powers would not greatly differ from ordinary procedure. But there were three special remedies which might still be termed extraordinary. These were (1) *restitutio in integrum*, (2) *missio in possessionem*, and (3) interdicts.

(1) *Restitutio in integrum* was the Praetor's discretionary power to annul proceedings, obligations, and liabilities, generally in favour of adolescents or other privileged persons; also on behalf of others on the ground of mistake, fraud, or duress. (2) *Missio in possessionem* placed property in the possession of the Law; the applicant or someone on his behalf was appointed custodian of it as an officer of the Court: it thus corresponded very closely to the English appointment of a "receiver." The property was generally an inheritance, an insolvent's estate, or some other *universitas rerum*. (3) An interdict was an Order by which the Praetor "like a sovereign" (*principaliter*) peremptorily commanded or forbade some act. It was, we have seen, originally the mainstay of possessors and quasi-possessors. The three most important interdicts were (*a*) *Quorum Bonorum*, (*b*) *Uti Possidetis*, (*c*) *Utrubi*, applying respectively to inheritances, immovables, and movables. (*a*) This ordered all others to give up to A whatever they had of the goods of which (*quorum bonorum*) possession was thereby granted to A as the praetorian

heir. (*b*) This forbade any violent dispossession of an immovable as one or other of you possess it (*uti possidetis*) peaceably, openly, and not by license from the other claimant (*nec vi nec clam nec precario*). (*c*) This forbade violent dispossession of a movable in the hands of whichsoever (*utrubi*) it now is peaceably, etc. For *Quorum Bonorum* the applicant had to show his place in the praetorian scheme of succession. For *Uti Possidetis* or *Utrubi* it sufficed, under Justinian, to show that he had possession at the time of his application. Proceedings on interdict under the Formulary system might be exceedingly complicated. Afterwards it became a mere preliminary step before or in an action for recovery or confirmation of possession.

Justinian made few changes in procedure. Among his greatest reforms in other branches of Law we may enumerate (1) the invention of *adoptio minus plena*, (2) making delivery the general method of conveyance, (3) introducing private ownership of provincial lands, (4) assimilating usucapion and long possession, (5) turning praetorian into legal ownership, (6) the *beneficium inventarii*, and (7) substituting cognation for agnation as the guiding rule of succession.

APPENDIX

NOTES ON WORDS AND PHRASES

Aerarium was originally the public treasury of the *Populus; Fiscus* the Emperor's privy purse supplied out of Imperial revenues: in time the two were amalgamated and the names became synonymous, *fiscus* being more commonly used.

Auctoritas was (1) the legal authority of the *Prudentes*, (2) the supplementing power of a tutor, (3) warranty of title by a seller to the thing sold.

Causa was (1) ground for giving title to property, *e.g.* sale, legacy; (2) method of acquisition, *e.g.* delivery; (3) accrued profits wider than *fructus*, *e.g.* children of a slave; (4) consideration for an agreement; (5) a legal proceeding, *e.g. causa liberalis*, as by *vindicta;* (6) a term in overclaim, generally in point of quality.

Cautio was security in two senses, (1) as given by a tutor, usufructuary, party or *procurator* in an action, and others; (2) a written acknowledgment of indebtedness.

Circumluvio occurred in two ways, (1) a new island arising in a river; (2) a new channel leaving and again joining the old one, thus isolating a piece of land.

Confusio was (1) merger, *e.g.* of a servitude in the *dominium*, or of contract when creditor and debtor became one; merger of usufruct was distinguished as *consolidatio;* (2) melting together of two solids or mixing of two liquids.

Detentio was physical as opposed to legal possession, *e.g.*

detention of a thing lent contrasted with possession of a pledge: *retentio* was lien on property arising out of some claim on its owner.

Dies fasti were the Court days on which the Praetor exercised his ordinary judicial powers: these were denoted by three words; *do*, when he named the day for trial by a Judge; *dico*, when he settled and embodied in a *formula* the law applicable to the case; *addico*, when he adjudged property to one or other of the litigants.

Dolus was strictly any artifice, permissible or not, but was almost always short for *dolus malus; i.e.* in contract, fraud; in delict, any wrongful intention.

Elegantia was the correspondence of a particular legal rule with general principles of Law and with that "fitness of things" which was supposed to characterize the Law of Nature; such a rule was also said to be *congruens* or *consequens*.

Honorarius: tutor honorarius was a dormant or non-acting tutor; *curator honorarius* was one appointed by the Praetor.

Ignominia was any slur, however small, on reputation (*existimatio*); *infamia* was a definite deprivation of certain legal rights.

Illustres formed a rank or dignity below *patricii* and *consulares*, but above *spectabiles* and *clarissimi*. Most of these dignities were properly attached to certain offices, but the Emperors often bestowed them on favourites, as if they had held such offices.

Judicium was (1) the discriminative capacity of an adult, adolescent or *pubertati proximus;* (2) a Judge's Court; (3) his award; or (4) some particular proceeding, *e.g. judicium Cascellianum* in trial of interdicts under the Formulary system.

Lex was (1) ordinary law passed by *comitia centuriata;* (2) synonym for *plebiscitum;* (3) Private or Local law for

a grant of Public or Municipal lands to an individual, or for re-arrangement of lands; (4) imperative direction in a will, contrasted with fideicommissary request; (5) an essential condition in a contract, *e.g. lex commissoria.*

Mancipium in early times was (1) a slave; (2) status of bondage; (3) a bondsman; (4) a mancipable thing (*res mancipi*); (5) the process of mancipation. In the Institutes it has only the first meaning: for the others, see below.

Patricius was (1) originally a member of the *Populus* as distinguished from the *Plebs;* (2) later a man of rank, as holding or having held an office of dignity; (3) eventually restricted to the highest rank immediately below the Emperor.

Persona was legal character in relation to (1) Family; (2) The State (in Public Law); or (3) action or other legal act.

Reus was (1) party to a legal act, generally (2) to stipulation or other contract; (3) either party to a civil action, or (4) the accused in a criminal prosecution.

Semestria were decisions (*decreta*) of the Emperor in Council (*consistorium*), whether or not sitting as Court of Appeal (*auditorium*): from the time of Marcus Aurelius they were published half-yearly; hence the name.

Stipendium was provincial tax paid into the old *aerarium: tributum* was paid only by Imperial provinces into the *fiscus.* This distinction, referred to by Justinian, had ceased before his time.

Usus was (1) custom; (2) one mode of producing *manus* (see below); (3) the right of the *usuarius.*

Adstipulatio was addition of a subordinate co-Creditor in a stipulation. Originally, this was because in quite early times no one could sue, except in person. If then the

principal stipulator was likely to be absent, it was convenient to have another who, as party to the contract, could sue for the benefit of his principal. This reason ceased as soon as a plaintiff was allowed to appear by *procurator*. A second reason was that no one could stipulate for performance after his own death; but the *adstipulator*, if he survived, could then sue for the benefit of the principal's heir. This reason ceasing, when Justinian allowed stipulation to be so framed as to take effect after the stipulator's death, adstipulation became unnecessary and obsolete.

Capitis deminutio minima by its name should require real diminution of status. This was obviously so, when by arrogation a family-head became a *filiusfamilias*. It was less obvious when by emancipation a *filiusfamilias* became *sui juris*. Paul supplies the key to this anomaly. The emancipated son, he says, was *deminutus* because he was (at that date) emancipated by fictitious sales, each of which reduced him for the moment to bondage (*mancipium*). Though this reason was obsolete under Justinian, the name remained.

Causâ datâ, causâ non secutâ. Stipulation did not require valuable consideration to support it. But if it was proved that it had been made on the faith of value passing on both sides, and that this had failed on one side, the disappointed party might be relieved, generally by the stipulation being pronounced void.

Cedendo extraneo nihil agit, i.e. surrender of usufruct to a third person produced no effect by way of terminating the usufruct: the surrenderer remained *fructuarius* as between himself and the *dominus*, though the *extraneus* had the benefit of the private arrangement between himself and the usufructuary.

Cretio. This was a period of time, generally ranging from a hundred days to a year, fixed by a testator in his will for the *heres extraneus* to decide (*cernere*) whether he

would enter on the inheritance. *Cretio vulgaris* ran from the time when he first learned his right, and was made up only of *dies utiles*, *i.e.* all whole and half Court days, so that a nominal hundred might run to a hundred and fifty consecutive days. *Cretio continua* was of so many consecutive days, *utiles* or not, from the opening of the will. Arcadius abolished *cretio*, leaving the stranger-heir to his remedy of applying for *beneficium deliberandi*.

Crimen was (1) investigation or trial of a matter, whether civil or criminal; (2) a crime liable to punishment under Public Law, as distinguished from *delictum*, civil wrong. But the same act might be both *delictum* and *crimen*, *e.g.* *furtum*, *injuria*.

Criminal Law. The principal magistrate with criminal jurisdiction was the *Praefectus urbi*. There were lower magistrates, and appeal from them to him, and from him to the Emperor. Prosecution was by indictment (*denuntiatio*). Though the Praetor had no original criminal jurisdiction (*imperium merum*), he had auxiliary jurisdiction (*imperium mixtum*) for enforcing his commands given in civil proceedings, like our writs of attachment and committal. Among the criminal statutes referred to at the end of the Institutes are laws against murder (*de sicariis*), forgery (*de falsis*), treason (*majestas laesa*), embezzlement by public officials (*peculatus*), bribery of magistrates (*repetundae*), and bribery at elections (*ambitus*). Most of these were old laws passed by Sulla, Julius Cæsar, and Augustus.

Delegatus non potest delegare, *i.e.* an agent (*mandatarius*) must act in person; he can delegate his authority to a sub-agent only if, and so far as, his principal has expressly or by clear implication authorized.

Dies interpellat pro homine, *i.e.* expiration of the fixed time is equivalent to a demand, just as if the person entitled had made one. But a merely named time for performance is not thereby a time fixed as essential. The maxim holds

good only if it appears on the face of the contract that this time was fixed as an essential condition.

Dos aut datur aut dicitur aut promittitur, i.e. At the date of marriage *dos* might be there and then conveyed to the husband, or it might be covenanted for, and this (at the time of the Antonines) either by *dictio dotis* or by stipulation. Whether *dictio dotis* was wholly obsolete throughout the Empire by the date of Justinian we do not know.

Duae lucrativae causae in eundem hominem et in eandem rem concurrere non possunt, i.e. the same person cannot get the same thing twice over, in the sense of getting the thing itself and its value, each by a title which costs him nothing. *Causa* here is title or method of acquisition; *causa lucrativa* is an acquisition of clear gain without cost, as is gift or legacy contrasted with sale.

Edictum perpetuum was originally (1) any Praetor's "continuous" edict, including his *edictum tralatitium* with his own additions; it bound him continuously through his year of office. Later it meant in particular (2) the final edition of all previous edicts as collected and revised by Salvius Julianus and confirmed by the Senate at the instance of Hadrian. Its contents are known to us by numerous quotations in the Digest and elsewhere.

Lare commercioque interdictus was the full expression for a prodigal whom the Praetor had debarred from managing his household affairs and transacting other business.

Nemo partim testatus partim intestatus potest decedere, i.e. No one (except a soldier) can by his will dispose of part only of his property, leaving an intestacy as to the rest. English testators can and sometimes do. But the technical and comprehensive character of Roman heirship enabled the Court to sweep all the property into the provisions of any valid will.

Noxa caput sequitur. If a slave had become *noxa* by committing delict or quasi-delict, liability to a noxal action

on his account attached to his master at the date of the action. Therefore any master in selling a slave expressly or impliedly warranted against his being a *noxa*. *Caput* has here its popular sense of human being rather than its strict legal meaning in connection with status.

Omnia judicia absolutoria, i.e. all actions tried by a Judge admit of judgment for the defendant. The question arose where the defendant paid up or performed after *litis contestatio*. The Sabinians applied this maxim to all actions, *stricti juris* as well as *bonae fidei*: the Proculians confined it to *bonae fidei* actions. Justinian followed the Sabinian view.

Semel heres, semper heres. The maxim "Once an heir, always an heir" was broken equally by appointing an heir for a time or from a time, or by a combination of both. "Let Titius be my heir for one year from my death: let Sempronius be my heir from the first anniversary of my death," made the will *non jure factum* and produced intestacy.

Servile caput nullum jus habet, i.e. the slave-man has no right of action. Here again *caput* has its popular sense of human being, and *jus* is the right of demanding the proper form of action in the Praetor's Court. We might translate "has no perfect right," since a slave's legal rights, such as they were, were imperfect, as not being enforceable by action, though they had various other legal consequences.

Servitus servitutis esse non potest, i.e. the owner of a servitude cannot split it by creating a sub-servitude, *e.g.* reserving to himself his general right of way, but trying to give another a partial use, as in summer only, or for two hours a day. Paul applied this maxim to an attempted usufruct of a right of way, but it is difficult to see how a right of way, which has no *fructus*, could be ever supposed to be a capable subject for usufruct.

Servitutum non ea est natura ut aliquid faciat quis, sed

ut aliquid patiatur vel non faciat, i.e. the nature of servitude is such that the owner of the *res serviens* is not bound to do any act, but either he must permit the owner of the *res dominans* to do some act (affirmative servitude); or he must himself refrain from doing some act (negative servitude). "Right of way" is a typical example of an affirmative servitude, "Ancient Lights" of a negative. *Jus oneris ferendi* was, we saw, presumptively an exception to the first clause of the maxim.

Traditionibus et usucapionibus, non nudis pactis, dominia transferuntur, i.e. conveyance of ownership is by delivery or usucapion, not by informal agreement. This sounds as if *nudum pactum* was contrasted (as it generally is) with obligatory contract, and as if the latter, *e.g.* stipulation, could of itself convey ownership. But stipulation was of itself no more a conveyance than a pact was; it merely gave the stipulator a right to insist on a proper conveyance being made by the *promissor*, namely (in Justinian's time) by a formal delivery.

Tutor personae non causae vel rei datur, i.e. a tutor is appointed to complete the pupil's imperfect *persona*, not to manage some legal proceeding or particular property. *Causa* is here used in its fifth meaning. This saying of Ulpian was referred by him to testamentary tutors only; otherwise it was not universally true, as at his date a *tutor dativus* was often appointed to look after a lawsuit. But as under Justinian a curator would be appointed for this purpose, the saying now held good for all tutors.

Usureceptio was a particular case of usucapion in older times when mortgage by *mancipatio* conveyed ownership of land. If the mortgagor recovered possession by any means except hiring from the mortgagee, he recovered the ownership in one year, even though the date for repayment had not yet arrived. But mortgage in this form was obsolete long before Justinian.

Uti legassit super pecuniâ tutelâve suae rei, ita jus esto, *i.e.* whatever bequest a testator makes concerning his money or the tutorship (over an infant heir) of his property shall be legally valid. At the date of the Twelve Tables the word *legare* was used of institution of an heir, gift of legacy, appointment of a tutor, and all other imperative directions (*leges*). There seems to have been at first only one kind of legacy proper, the Civil legacy, which gave the legatee Quiritarian ownership, provided only that some heir entered. Later came the Praetorian legacy also, vesting directly in the heir, and passing on through him to the legatee. The first, by conferring ownership, enabled the legatee to sue by real action: hence it was called legacy *per vindicationem*. It was also known by the curious name of "*do lego legatum*": here the word *do* used as an epithet shows its conveyancing force. The second form gave only a personal action to the legatee against the heir. As its technical form lay in the words *Damnas esto heres meus solvere*, it received the name of legacy *per damnationem*. The English lawyer will here be struck by the analogy with our Law before 1897, when a devise vested directly in the devisee and a bequest in the executor. Two minor kinds of legacy were *sinendi modo* and *per praeceptionem*. There were technical words originally necessary for each kind, but by *Senatusconsultum Neronianum*, if the words used were not strictly applicable to any form, the legacy was to be construed as *per damnationem*. Justinian put all legacies on the footing of this last and made them practically equivalent to *fideicommissa*.

Uti nuncupassit, ita jus esto, *i.e.* for whatever purpose *mancipatio* was used, it was to be interpreted according to the accompanying verbal declaration (*nuncupatio*). Mancipation or conveyance *per aes et libram* (sometimes also called *nexum*) was the old form for transferring ownership of *res mancipi*; this term included Italian lands, slaves,

bondsmen, and domestic animals: all other things were *res nec mancipi*. The mancipation was in the form of a sale, real or fictitious, in which a single bronze coin (*aes* or *as*) was weighed out as the nominal price. It required the presence of eight citizens, the grantor and grantee, a balance-holder (*libripens*), and five witnesses. By way of fictitious sale it was used in adoption proper and emancipation, for reducing a freeman to the status of bondage, under the name of *coemptio* for putting a wife under the *manus* of her husband; under its name of *nexum* it was used for will-making and contracting. It became obsolete not long before the time of Justinian, but the seven witnesses to a will still continued to represent the original five together with the *familiae emptor* (nominal grantee) and *libripens*.

Uti optimus maximus, *i.e.* possession in its best and widest condition, free from servitudes or other incumbrances: this was what the seller (in the absence of special modifying provisions) was bound under implied warranty to deliver to the buyer.

Uxorem vir absens ducere potest, *i.e.* the intending husband need not be present at the marriage; a letter or message from him authorizing *deductio in domum* by his proxy sufficed for the legality of the ceremony. Marriage made no difference, under Justinian, in the status of the woman. Whether she was at the moment in the *potestas* of her own father or of some other person, or was *sui juris*, so she continued to be. Down to the time of the Antonine Emperors there was a third alternative, though it had already become very rare. Marriage might still be accompanied by *manus*. If it was to be *cum conventione in manum*, there would be (1) *Confarreatio* or (2) *Coemptio* (see above). The first was a religious ceremony before a pontiff; it qualified the child of such a marriage to become *Flamen Dialis* or Vestal Virgin. But the second was far more

usual. In still earlier times the wife married without *conventio in manum* at the date of the wedding, nevertheless fell into her husband's *manus* at the end of any unbroken year of cohabitation, but this could be avoided by taking the benefit of the *jus trinoctii*, an absence of three nights from her husband's house. This broke the *Usus*, which otherwise, as in the case of any other chattel, would have developed possession into ownership. *Usus* was, in fact, only a short name for *usucapio*. By *manus* the wife herself nominally, and all her property actually, passed into the absolute ownership of her husband, provided he was *sui juris*. But if he was still *in potestate*, the property-rights accruing under *manus* would belong to his natural or adoptive father.

We may here complete the subject of ancient family-status by noticing bondage (*mancipium*). The bondsman was not a slave, but was said to be *in servi loco*. A debtor by *nexum* might in earlier times fall into bondage; so might a *filiusfamilias* by noxal surrender, until Justinian confined it to the case of slaves. In the old methods of effecting adoption and emancipation the *filiusfamilias* was sold into bondage, but in form only and momentarily (*dicis causâ*), as he was immediately remancipated or emancipated. But where *mancipium* was real and enduring, the bondsman had to work for his temporary master, like a slave, and like a slave could be freed only by formal manumission. We now see that the family household of older times, in its fullest form, was made up of five degrees of status: (1) the *paterfamilias*, (2) children *in potestate*, (3) the wife *in manu*, (4) bondsmen, (5) slaves. Even before the accession of Justinian *manus* had wholly disappeared, and *mancipium*, even in the case of noxal surrender of a son, was perhaps practically unknown; this he formally abolished.

ANALYSIS.

- **Law** ...
  - I. Public (Constitutional, Criminal, Sacred).
  - II. Private
    - Substantive
      - Family conditions (*Jus Personarum*).
      - Property, succession, obligation (*Jus Rerum*).
    - Adjective
      - Procedure (*Jus Actionum*).

Sources ...
- civil.
- praetorian.

Modes
- direct (law, plebiscite, S. C., constitution).
- indirect (edict, *responsa*).

Family ... *Paterfamilias* of perfect capacity (*dominica potestas, patria potestas*).

imperfect capacity
- with tutor.
- curator.

Property ...
- kinds of things.
- modes of acquisition.

Possession
- natural.
- civil.

Rights *in re*
- indefinite.
- definite
  - praedial.
  - personal.

Succession ...
- testamentary
  - inheritance
  - legacy

  (direct. / indirect (trusts).)
- intestate
  - to freemen.
  - freedmen.
- under insolvency.

Obligation ...
- by agreement—contract
  - direct
    - formal.
    - executed.
    - executory.
  - indirect—agency (mandate, &c.)
- circumstances (quasi-contract).
- wrong-doing
  - direct (delict).
  - indirect (quasi-delict).

Procedure ...
- ordinary—action.
- extraordinary—interdict, &c.

TABLES.

Events.

Foundation of Rome	753 B.C.
Comitia centuriata	c. 550
Twelve Tables	c. 450
Jus Flavianum	c. 312
Praetor Peregrinus	247
Edictum Perpetuum	131 A.D.
Gregorian Code	c. 284
Theodosian Code	438
Digest and Institutes	533
Second Code	534

Emperors.

(Julius Caesar)	48 B.C.
Augustus	27
Tiberius	14 A.D.
Claudius	41
Nero	54
Vespasianus	70
Titus	79
Nerva	96
Trajanus	98
Hadrianus	117
Antoninus Pius	138
Marcus Aurelius	161
Pertinax	191
Septimius Severus	193
Caracalla	211
Gordianus	238
Decius	249
Diocletianus	284
Constantinus	312
Arcadius and Honorius	395
Theodosius II.	408
Valentinianus III.	425
Zeno	475
Anastatius	492
Justin	518
Justinianus	527–565

Of the Five Jurists, Gaius wrote in the reign of Marcus Aurelius; the other four under Severus.

Laws.

	PAGE
Lex Aelia Sentia (4 A.D.)	20, 21
Atinia (c. 120)	51
Cornelia de edictis (66)	14
falsis (80)	70
injuriâ (81)	128
sicariis (81)	22
Falcidia (40)	84
Fufia Caninia (8 A.D.)	21
Hortensia (287)	3
Julia peculatus (17)	145
repetundarum (17)	145
Julia et Plautia (17)	51
Junia Norbana (19 A.D.)	20
Papia Poppaea (9 A.D.)	37, 83
Petronia (c. 61 A.D.)	22

All B.C., except the five marked A.D.

Senatusconsulta.

S.C. Macedonianum (c. 45)	112
Neronianum (64)	149
Orfitianum (178)	89
Pegasianum (70)	85
Tertullianum (158)	89
Trebellianum (62)	85, 86

All these were A.D.

Actions.

Actio ad exhibendum	125
aestimatoria	103
bonorum vi raptorum	125
commodati	98, 125
communi dividundo	136
conducti	105, 106
confessoria	64
damni injuriae	126
de pauperie	130
peculio	112
tigno injuncto	45
depositi	99, 136
empti	104
ex stipulatu	95

INDEX

THE END

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, LONDON AND BE

A SHORT LIST

OF SOME OF

Sweet & Maxwell's

BOOKS FOR LAW STUDENTS.

SUBJECT INDEX.

SWEET & MAXWELL, LIMITED,

3, Chancery Lane, London.

Suggested Course of Reading for the Bar Examinations.

ROMAN LAW.

Hunter's Introduction or Kelke's Epitome, and Shearwood's Roman Law Examination Guide. Advisable also is Sandars' Justinian.

CONSTITUTIONAL LAW.

Ridges, with Kelke's Epitome Dean's Legal History.

CRIMINAL LAW & PROCEDURE.

Odgers' Common Law, or Wilshere's Criminal Law and Procedure, and Wilshere's Leading Cases.

REAL PROPERTY.

Goodeve or Williams (with Wilshere's Analysis). For revision, Kelke's Epitome.

CONVEYANCING.

Elphinstone's Introduction, and Clark's Students' Precedents.

COMMON LAW.

Odgers' Common Law of England, and Cockle's Leading Cases. Or Carter on Contracts, and Fraser on Torts.

EVIDENCE & PROCEDURE.

Odgers' Common Law and Cockle on Evidence. For revision, Wilshere's Outlines.

EQUITY.

Snell. For revision, Kelke's Leading Cases.

COMPANY LAW.

Kelke's Epitome.

duction and Tables of Local Taxation. By Rt. Hon. HENRY HOBHOUSE and E. L. FANSHAWE, Barrister-at-Law. Price 7s. 6d.

"The work gives within a very moderate compass a singularly clear and comprehensive account of our present system of local self-government, both in urban and rural district. We are, indeed, not aware of any other work in which a similar view is given with equal completeness, accuracy, and lucidity."—*County Council Times.*

"Lucid, concise, and accurate to a degree which has never been surpassed."—*Justice of the Peace.*

EASEMENTS.

BLYTH'S Epitome of the Law of Easements. By T. T. BLYTH, Barrister-at-Law. 158 pages. Price 6s.

The Author's aim in writing this book has been to set forth, as clearly and accurately as possible, an outline of the law relating to easements. He has confined himself to dealing with easements properly so called, and has not touched upon kindred topics, such as *profits à prendre* or licenses, except so far as is necessary to distinguish them from easements.

"The book should prove a useful addition to the student's library, and as such we can confidently recommend it."—*Law Quarterly Review.*

"A very useful little book, well written, and thoroughly readable."—*Law Notes.*

BAR EXAMINATION QUESTIONS.

SHEARWOOD'S Bar Examination Questions, with Answers. Commencing Hilary Term, 1911. Vol I., cloth. Price 8s. net.

Issued after each Examination, price 2s. per part.